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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1344

HUMBLE OIL & REFINING COMPANY,
Appellant

v.

RAILROAD COMMISSION OF TEXAS, ET AL.,
Appellees

APPEALED FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS TO THE SUPREME COURT OF THE UNITED STATES

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Pursuant to Rule 21 of the rules of the Supreme Court of the United States, Appellant submits this statement to disclose the basis unpon which Appellant contends that the Supreme Court of the United States has jurisdiction upon appeal to review this cause on appeal from the final judgment of the

Court of Civil Appeals for the Third Supreme Judicial District of Texas, sustaining an order or rule of the Railroad Commission of Texas which was and is challenged as being repugnant to the Due Process clause and the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States, as hereinafter more fully shown.

I.

Statutory Provisions Sustaining Jurisdiction

a. The Supreme Court of the United States has jurisdiction of this appeal under Section 237 of the Judicial Code as amended (U. S. C. A. Title 28, Sec. 344(a), which provides:

> "(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * *"

b. Pursuant to the Act of January 31, 1928, (45 Stat. 54; U. S. C. A. Title 28, Sec. 861(a) as amended by the Act of April 26, 1928, (45 Stat. 455; U. S. C. A. Title 28, Sec. 861(b), the present appeal is brought in lieu of a writ of error.

II.

Rule of the Railroad Commission, The Validity of Which Is Involved

The rule or order of the Railroad Commission here under attack is Rule 15 of the Railroad Commission's rules for the Hawkins Oil Field in Wood County, Texas, adopted by the Railroad Commission on August 3, 1944. Said rule distributes the allowable production for the Hawkins Field among the wells in that field. Rule 15 contains the following provisions:

> "Rule 15. (a) The proration unit shall be twenty(20) acres, and no acreage shall be assigned to a unit which is more than one thousand fifty (1,050) feet from a producing well. A tolerance of ten (10) acres on the last well on producing tracts of more than twenty acres shall be allowed where the size and shape of the tract so warrants. Where tolerance is allowed, no acreage shall be assigned to the unit or the last well which is more than twelve hundred eighty (1280) feet from the well. Units which do not contain as much as twenty acres shall be considered as fractional units. Acreage units or fractions thereof whether containing more or less than twenty acres will be considered, for proration purposes, on the basis of the actual acreage assigned to the individual unit or fractional unit.
>
> "(b) Provided, however, that for the period of the War Emergency or for the period of P. A. W. restrictions on drilling,

and for a period of not to exceed six months following the termination of said emergency or the lifting of the P. A. W. restrictions on drilling, any well which, as a result of such restrictions, has been required to have available for assignment to it not less than forty surface acres may receive credit in the allocation program for the entire forty acres assigned to the well for drilling purposes so long as the two points farthermost removed from each other and contained in such drilling unit are not in excess of 2087 feet apart.

"(c) The total daily field allowable as fixed by the Commission, after deductions have been made for marginal wells, wells incapable of making their allowable, and high gas-oil ratio wells, shall be distributed to the remaining wells in the field on the following basis: To each remaining well in the field X barrels of oil shall be allocated. In addition to X barrels each of these remaining wells shall receive an amount of allowable oil equal to five (5%) per cent of X barrels for each acre in the unit up to and including twenty acres.

"(d) Provided, however, that for the period of the War Emergency or for the period of P. A. W. restrictions on drilling, and for a period of not to exceed six months following the termination of said emergency or the lifting of the P. A. W. restrictions on drilling, any well which may be assigned forty acres under the provisions of paragraph (b) hereof shall, in addition to the allowable accruing to such well by application of the provisions of

paragraph (c) hereof, be assigned an allowable equal to ten per cent of X barrels for each acre assigned such well above twenty acres.

"(e) It is the intent of this order to provide that a well to which twenty acres has been assigned shall not receive an allowable greater than twice that which has been assigned to a well on a tract less than one acre, that a well to which there has been assigned as much as thirty acres shall not receive an allowable greater than two and one-half times the allowable of a well to which has been assigned less than one acre, and that a well to which forty acres has been assigned shall not receive an allowable greater than four times that which is assigned to a well on a tract less than one acre.

"It is further ordered that this cause be held open the Docket for such other and further orders as may be necessary and supported by evidence of record. Railroad Commission of Texas."

III.

Date of the Judgment and Date of Presentation of Application for Appeal

1. The judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, of which a review is sought by this appeal, was entered on March 6, 1946. Appellant's Motion for Rehearing was filed in the Court of Civil Appeals within fifteen days after the entry of the judgment, as authorized by Rule 458, Texas Rules of Practice

and Procedure in Civil Actions. The Motion for Rehearing was entertained by the Court of Civil Appeals and was overruled on April 10, 1946. Thereupon, within the time allowed and in the manner provided by Texas law (Rule 468, Texas Rules of Practice and Procedure in Civil Actions) Appellant filed its Application for Writ of Error addressed to the Supreme Court of Texas, petitioning that court to grant writ of error to the said Court of Civil Appeals to the end that the judgment of the Court of Civil Appeals might be reviewed and reversed. The Application for Writ of Error was entertained by the Supreme Court of Texas and refused on December 18, 1946. Thereafter Appellant within fifteen days, as authorized by Texas law (Rule 515, Texas Rules of Practice and Procedure in Civil Actions), filed its Motion for Rehearing on the order of the Supreme Court of Texas refusing Appellants' Application for Writ of Error. Said Motion for Rehearing was entertained by the Supreme Court of Texas and was overruled on January 15, 1947. Whereupon the judgment of the Court of Civil Appeals, here sought to be reviewed, became final under Texas law.

The Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas, has possession of the record in this cause and is the highest court of this State in which a decision in this suit could be had.

The following are examples of cases brought to the Supreme Court of the United States by writ of error or appeal from Texas Courts of Civil Appeals: *Zucht v. King*, 260 U. S. 174; *Lone Star Gas Com-*

pany v. Texeas, 304 U. S. 224; *H. E. Butt Grocery Company v. Sheppard, Comptroller of Public Accounts of Texas*, 311 U. S. 608.

2. Petition for allowance of an appeal to the Supreme Court of the United States was presented to the Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas on March 28, 1947, and was on the same day refused by said Chief Justice upon the ground that his consistent policy is to refuse all petitions for appeal to the Supreme Court of the United States, as more fully appears from his order thereon (R. 2112).

3. The date on which this application for appeal is presented to this court is April 11, 1947.

IV.

Statement of the Nature of the Case and of Rulings of the State Court Which Bring This Case Within the Above Stated Statutory Jurisdiction of This Court

Rule 15 was promulgated by the Railroad Commission of Texas on August 3, 1944, in the exercise of delegated legislative authority. It was promulgated to operate prospectively; it is legislative in character, and under Texas law it has the force and effect of an enactment of the Legislature. (*Sun Oil Co. vs. Railroad Commission*, 68 S. W. (2d) 609, 611; *Texarkana & Ft. S. Ry Co. et al vs. Houston Gas & Fuel Co.*, 121 Tex. 594, 51 S. W. (2d) 284, 287; *Railroad Commission et al vs. Uvalde Const. Co. et al*, 49 S. W. (2d) 1113, 1114; *West Texas*

Compress & Warehouse Co. vs. Panhandle & S. F. Ry Co. et al, 15 S. W. (2d) 558, 560; *Missouri-Kansas-Texas Ry. Co. of Tex. et al vs. Railroad Commission of Texas et al*, 3 S. W. (2d) 489, 494.) Violations of the order or rule may be punished by infliction of penalties; the purchase, sale, transportation or handling of any oil produced in violation of the rule or order are prohibited and may be enjoined at the suit of the State; and any oil produced in violation of such rule or order is declared by statute to be a nuisance and may be forfeited to the State at the suit of the Attorney General. (Articles 6046, 6049e and 6066a, Vernon's Texas Civil Statutes.) Therefore the Railroad Commission order or rule challenged in this case has, under Texas law, the force and effect of a statute and is within the meaning of the term "statute of any State," as used in Section 237 of the Judicial Code, as amended. *Lake Erie & Western RR Co. vs. State Public Utilities Com. of Ill.*, 249 U. S. 422, 424; *Northwestern Bell Telephone Co. vs.Nebraska State Ry Co.*, 297 U. S. 471; *Lone Star Gas Co. vs. Texas et al*, 304 U. S. 224; *Jurisdiction of the Supreme Court of the United States, Robertson and Kirkham*, pp. 11-14.)

Nature of the Case

Appellant was plaintiff in this action in the trial court; defendants were the Railroad Commission of Texas, its three members, and the Attorney General of Texas. Appellant sued to enjoin the enforcement of said Rule 15; the basis of Appellant's complaint was and is that Rule 15 discriminates against Ap-

pellant and allows the taking of Appellants' property without due process of law. In its pleadings in the trial court Appellant alleged specifically that said Rule 15 is void under the Constitution of the United States because it is confiscatory and discriminatory. (R. 11.)

Floy K. Williams, D. F. Williams, A. L. Atkins, Florence Cowles Hamlett, L. A. Bryan, Jr., R. L. Peveto, Paul D. Smith and Jack Kay, the owners of land, royalty and mineral interests in large tracts in the Hawkins Field, intervened in the trial court, alleging that Rule 15 is invalid under the Constitution of the United States because it is discriminatory and confiscatory (R. 20).

Charles F. Ashcroft and others named in the petition for appeal, owners of interests in small tracts in the densely drilled Hawkins Townsite, intervened in the trial court, and asserted that said Rule 15 is valid. (R. 54-113.)

Pertinent Facts in the Case

The structure upon which the Hawkins Oil Field is located is a subsurface dome about 4.8 miles long and approximately 4 miles wide. A large fault with a displacement of approximately 400 feet has, for all practical purposes, divided the Hawkins Field into two producing fields; the area west of this fault is called West Hawkins and the area east of the fault is called East Hawkins. There is no effective drainage or communication between West Hawkins and East Hawkins (R. 528-530). Hawkins Field, discovered in December, 1940, contains 8,372 acres

known to be productive of oil; West Hawkins contains 7,000 acres of this area, of which 6,300 acres are under lease to Appellant (R. 548, 567).

The Town of Hawkins occupies 137 acres in West Hawkins and, because the Townsite is divided into small lots and blocks, the Railroad Commission has permitted the drilling of 87 wells on 74 acres in the town. The Commission has restricted drilling in all other parts of the field to one well on 20 acres. The remaining 63 acres of the Townsite is under lease to Appellant and the Commission has allowed Appellant to drill only five wells thereon. War time federal restrictions limited drilling to one well on 40 acres and many tracts in the field had only one well on 40 acres at the time of the trial (R. 560-562, 610-611).

Said Rule 15 allows 87 wells in the densely drilled part of the Townsite to produce 4,147 barrels per day, or 9.3% of the field allowable, although the 74 acre area on which these wells are located contains only 1.5% of the recoverable oil in the field. The remaining 63 acres of the Townsite, on which Appellant has been allowed to drill only five wells, is restricted by Rule 15 to a daily production of 316 barrels, although this 63 acre area contains practically the same amount of recoverable oil as the densely drilled 74 acre area. Appellant's leases outside the Townsite in West Hawkins contain 88.6% of the total recoverable oil in place in West Hawkins; the order in suit allows Appellant to produce only 78% of the allowable for West Hawkins. On the other hand, the densely drilled Townsite produces 10.87% of the West Hawkins allowable, although it contains only 1.86% of the recoverable oil in place in West

Hawkins (R. 619-621; 1848). As the direct result of this order, substantial, uncompensated, net drainage has occurred and is occurring from Appellant's properties in West Hawkins to the densely drilled Townsite. Such drainage will continue so long as Rule 15 remains in effect (R. 596, 988). Appellant's Exhibit No. 4 (R. 1848) is a table prepared by Appellant's witness Morgan J. Davis which gives the following information as to each operator in West Hawkins: Acre feet of sand, original recoverable oil in place, daily allowable, cumulative production, future production under Rule 15, and the amount of such future production which will be drained from others. This exhibit shows that Rule 15 will result ultimately in the net drainage of more than 30,000,000 barrels of oil from Appellant's leases outside of the Townsite; this quantity of oil will be taken from Appellant and produced through the wells of the Townsite operators if Rule 15 remains in effect during the rest of the life of the Hawkins Field (R. 993-994).

The exhibit above referred to shows also that most of the Townsite operators already have produced far more oil than the total amount of recoverable oil originally in place in their properties. For example, General American Oil Company, largest Townsite operator, had originally 386,000 barrels of recoverable oil in place in its properties; up to February 1, 1945, this company had produced 776,000 barrels, or approximately twice the amount of oil which originally underlaid General American's leases. Likewise, R. Lacy, operator of six wells, had produced 337,000 barrels prior to February 1, 1945, although

his properties contained originally only 116,000 barrels (R. 1848). The field will last for approximately 28 more years at the present rate of production, and the history of the field shows that the wells in the densely drilled Townsite will last as long as any other wells in the field. By allowing the operators of these Townsite wells to drain oil from Appellant, the Railroad Commission has denied to Appellant a chance to recover currently or at any time in the future the oil in place in Appellant's property R. 993-994; 603-604).

The history of the bottomhole pressures of the wells in the field shows that substantial quantities of oil have drained into the Townsite from the large tracts in West Hawkins which are under lease to Appellant. The fact that the pressure in the densely drilled area is only 22 pounds lower than that in the rest of West Hawkins proves that practically all of the oil produced from the 87 wells in the densely drilled area has been replaced by oil which moved in from other leases in West Hawkins; but for this drainage the Townsite pressure would be several hundred pounds lower than it is. The fundamental cause of the drainage of oil from Appellant's properties to the Townsite is Rule 15, which gives a disproportionately high allowable to the Townsite wells. Such drainage will continue so long as Rule 15 remains in effect, with the inevitable result that Appellant will be deprived forever of the opportunity to produce the recoverable oil in place in Appellant's properties. A comparison of pressure decline in the Townsite with the production in the Townsite shows that drainage to the Townsite is occur-

ring now at the rate of approximately 3,000 barrels per day. The wells in the densely drilled Townsite will last as long as the rest of the field produces and no physical barrier prevents drainage of oil into this densely drilled area (R. 979-993).

The undisputed testimony shows that the taking of Appellant's property which results from Rule 15 is not necessary to prevent waste. The undisputed testimony shows also that there are no physical facts which justify the discrepancy between the rate of production allowed to the densely drilled Townsite and the rate of production allowed to the rest of the field. Furthermore it is undisputed that the Railroad Commission could reduce or prevent the drainage from Appellant's properties by simply amending Rule 15 so as to allocate more than 50% of the field allowable to acreage and less than 50% of the field allowable to wells (R. 618, 872).

The witnesses who appeared in behalf of the Railroad Commission and the Townsite operators testified that Rule 15 resulted in the drainage of large quantities of oil from Appellant's properties and that such drainage is not necessary to prevent waste. The witness Boatright testified that up to February 1, 1945, at least 2,000,000 barrels of oil had drained into the Townsite (R. 1404). He testified also that under Rule 15 the 48 wells belonging to Appellee Townsite operators ultimately will drain 17,000,000 barrels of oil from lands belonging to others in West Hawkins if those wells last as long as the other wells in the field (R. 1339). Boatright testified also that, unless some unforseen change occurs in the physical conditions now known to exist in the field,

said 48 wells will last as long as the other wells in the field (R. 1351-1353; 1362).

The witness Teis, appearing in behalf of Appellee Townsite operators, had studied only a 20 acre portion of the Townsite which contains 26 wells. Teis testified that during the next ten years these 26 wells will drain 4,200,000 barrels of oil from the larger tracts in West Hawkins (R. 1702). Teis conceded that Rule 15 results in drainage of Appellant's properties and denies to Appellant a chance to recover the oil in Appellant's properties (R. 1737-1739). He testified also that Rule 15 is not necessary to prevent waste (R. 1739).

The witness Baumel, appearing in behalf of Appellee Railroad Commission, testified that Rule 15 results in drainage from the larger leases in West Hawkins to the Townsite and that such drainage will continue so long as Rule 15 is in effect (R. 1783, 1799). Baumel conceded that the order is not necessary to prevent waste and stated that the Commission could reduce the drainage by simply amending Rule 15 so as to allocate more than 50% of the field allowable to acreage and less than 50% of the field allowable to wells (R. 1796, 1785).

The case was tried to a jury which found, in response to special issues, that Rule 15 prevents Appellant from producing the recoverable oil now in place under its lands or the equivalent in kind of such oil. The jury made the same finding in response to similar issues with reference to the lands of Mrs. Floy K. Williams et al, who were intervenors. The trial court entered judgment decreeing Rule 15 invalid and enjoining enforcement thereof in so far

as Appellant and Mrs. Floy K. Williams et al are concerned. (R. 241-245.)

Nature of the Rulings of the State Court Which Bring This Case Within the Jurisdiction of This Court

The Railroad Commission, the Attorney General, and the townsite operators who were defendants in the trial court prosecuted an appeal from the judgment of the trial court to the Court of Civil Appeals for the Third Supreme Judicial District of Texas. The Court of Civil Appeals reversed the judgment of the trial court and rendered judgment against appellant and interveners, Floy K. Williams, et al. The Court of Civil Appeals delivered a written opinion which is reported as *Railroad Commission of Texas, et al, vs. Humble Oil & Refining Company, et al*, 193 S. W. (2d) 824 et seq. A copy of this opinion is appended hereto. As shown by the opinion the Court of Civil Appeals found that the undisputed evidence disclosed that appellant's oil was being drained from appellant's land as a result of said Rule 15. The Court of Civil Appeals said in the opinion:

> "* * * there was no conflict regarding the issue of substantial uncompensated excess drainage. All the witnesses testified and appellants admit in their brief, that there was such drainage ,although not conceding the extent thereof as testified to by Humble's witnesses. If therefore this issue constituted the only factor involved in determining the validity of the order, then appellees' contention that its invalidity was

> conclusively shown would be correct, and require an affirmance of the judgment." (193 S. W. (2d) 829; Appendix 10.)

The Court of Civil Appeals found also that Rule 15 is not necesary to prevent waste and that the drainage from appellant's properties could be reduced or prevented by amending Rule 15 so as to distribute less than 50% of the field allowable to wells and more than 50% of the field allowable to acreage.

Having found that appellant's property is being taken without any justifying public purpose, the Court of Civil Appeals nevertheless held that the rule is valid because under another rule (the spacing rule), which is not involved in this suit, appellant has been saved a large sum in drilling expense. The Court of Civil Appeals said in the opinion:

> "Independently of these considerations, however, there is another factor compensatory of the disparity in withdrawals between large and small tracts; the means for evaluating which are much more tangible; namely, the saving in cost of production under the 20-acre spacing pattern and proration order. On a 20-acre tract the cost of production of a given amount of oil is only half of that on a tract of less than one acre, which latter is four times the cost of a 40-acre tract. As illustrative of the effect of this factor the evidence shows that the saving in original cost, exclusive of operation cost, to the Humble alone between drilling on a 20-acre spacing pattern and on a 10-acre spacing pattern

> would amount to approximately $10,000,000. To evaluate this saving it would have to be capitalized at a reasonable rate of interest and amortized over the period of the life of the field (27 years). Against this investment, at most, is the 5% of additional recoverable reserves (30,000,000 barrels of oil) the production of which would be spread out over the same 27 years." (193 S. W. (2d) 832-833; Appendix 20-21.)

It is apparent that the holding of the Court of Civil Appeals is based entirely upon the erroneous premise that appellant's property may lawfully be taken for the private use of the townsite operators, because appellant is "compensated by reduced drilling cost." The Court of Civil Appeals sums up its holding in these words:

> "Waiving other issues aside, however, and considering only the compensatory effect of reduced drilling cost, and this independently of reduced operating cost, we think the order was well within the discretionary powers of the Commission in making it." (193 S. W. (2d) 834; Appendix 24-25.)

V.

The Federal Questions Relied Upon as Sustaining the Jurisdiction of This Court Are Substantial

Under Texas law oil and gas in place belong to the owner of the soil. *Texas Company v. Daugherty*, 107 Tex. 226, 176 S. W. 717. *Brown v. Humble Oil*

& Refining Company, 126 Tex. 296, 83 S. W. (2d) 935. It is equally well settled that in Texas the owner of oil and gas in place has a right to produce his oil and that any infringement upon that right by the Railroad Commission can be upheld only upon the ground that it is necessary to prevent waste. *Brown v. Humble Oil & Refining Company* (supra). *Marrs v. Railroad Commission*, 142 Tex. 293, 177 S. W. (2d) 941. Every owner of land in Texas is entitled to a fair chance to recover the oil and gas in or under his land and any denial of such fair chance amounts to confiscation. *Marrs v. Railroad Commission* (supra). *Gulf Land Company v. Atlantic Refining Company*, 134 Tex. 59, 131 S. W. (2d) 73.

The Court of Civil Appeals found that the undisputed evidence shows that the challenged Rule results in the drainage of substantial quantities of oil from Appellant's property; the Court of Civil Appeals said in its opinion: ". .. there was no conflict regarding the issue of substantial, uncompensated excess drainage. All witnesses testified and Appellants (Appellees here) admit in their brief, that there was such drainage, although not conceding the extent thereof, as testified to by Humble's witnesses. (193 S. W. (2d) 829; Appendix 10.) The Court of Civil Appeals found also that said rule is not necessary to prevent waste. (193 S. W. (2d) 832; Appendix 19.)

In reversing and rendering the judgment of the District Court the Court of Civil Appeals conceded that all testimony given by witnesses for Appellant, including the opinions and conclusions of those

witnesses, was correct. The Court of Civil Appeals said in its opinion: ". . . we are assuming, for our present purposes, the correctness of the facts and the estimates and conclusions drawn therefrom as testified to by Humble's witnesses." (193 S. W. (2d) 832; Appendix 18.)

The testimony of Appellant's witnesses was that

(1) the challenged rule results in the drainage of 3,000 barrels of oil daily from Appellant's properties to the Townsite wells and that said rule ultimately will result in allowing the Townsite operators to produce and market 30,000,000 barrels of oil now in place in Appellant's lands (R. 993, 1848);

(2) the challenged rule is the sole cause of this drainage and Appellant could and would produce its fair share of the oil in the field but for said rule (R. 618-619, 987-988);

(3) said rule is not necessary to prevent waste (R. 618);

(4) the drainage from Appellant's properties could easily be prevented or reduced by amending said rule so that less than 50% of the field allowable is allocated to wells (R. 618, 872).

The findings and holdings of the Court of Civil Appeals reduce the issues in this case to utmost simplicity. Stated briefly, these findings and holdings reflect that the challenged rule is not necessary to prevent the waste of oil and gas, that it takes 30,000,000 barrels of oil from Appellant and gives same to the Townsite operators, and that the Railroad Commission could easily remedy this situation with-

out creating waste by amending the rule so as to allow Appellant to produce a larger share of the field allowable.

The sole reason assigned by the Court of Civil Appeals for holding the challenged rule valid is that the Commission's 20 acre spacing rule, which is not involved in this suit, saved Appellant a sum of money large enough to offset the value of the oil taken from Appellant. In other words, the Court of Civil Appeals held that by preventing Appellant from drilling more than one well on each 20 acres, the Commission had reduced Appellant's drilling cost and, therefore, could confiscate a quantity of oil equal to the "saving" in drilling expenses. The Court of Civil Appeals stated in its opinion:

> "Independently of these considerations, however, there is another factor compensatory of the disparity in withdrawals between large and small tracts; the means for evaluating which are much more tangible; namely, the saving in cost of production under the 20-acre spacing pattern and proration order. On a 20-acre tract the cost of production of a given amount of oil is only half of that on a tract of less than one acre, which latter is four times the cost of a 40-acre tract. As illustrative of the effect of this factor the evidence shows that the saving in original cost, exclusive of operation cost, to the Humble alone between drilling on a 20-acre spacing pattern and on a 10-acre spacing pattern would amount to approximately $10,000,000. To evaluate this saving it would have to be capitalized at a reasonable rate

> of interest and amortized over the period of the life of the field (27 years). Against this investment, at most, is the 5% of additional recoverable reserves (30,000,000 barrels of oil) the production of which would be spread out over the same 27 years." (193 S. W. (2d) 832; Appendix 20-21.)

> "Waiving other issues aside, however, and considering only the compensatory effect of reduced drilling cost, and this independently of reduced operating cost, we think the order was well within the discretionary powers of the Commission in making it.' (193 S. W. (2d) 834; Appendix 24-25.)

It should be noted that the 20 acre spacing rule was adopted by the Commission as a waste prevention measure and is admitted by all parties to be a valid rule; if this spacing rule were not necessary to prevent waste it would not be a valid rule. It should also be noted that there has never been a 10 acre spacing rule in the Hawkins Feld and that the "10-acre spacing pattern" used by the Court of Civil Appeals to determine the "saving" to Appellant is a purely arbitrary assumption. Obviously the spacing rule does not and could not compensate Appellant for the loss of its oil, but the challenged rule would be invalid even if Appellant were paid in cash for every barrel of oil taken from it. It is fundamental that the property of one citizen cannot lawfully be taken for the private use of another citizen, even though compensation be paid. The

holding of the Court of Civil Appeals that the Commission may take Appellant's property and give it to the Townsite operators without a justifying public purpose violates the Due Process clause and the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States and is squarely in conflict with the following decisions of this Honorable Court: *Thompson v. Consolidated Gas Company*, 300 U. S. 55, 57 S. Ct. 364; *Missouri Pacific Railroad Company vs. Nebraska*, 164 U. S. 403, 17 S. Ct. 130; *Chicago, St. P. M. & O. Ry Co. v. Holmberg*, 282 U. S. 162, 51 S. Ct. 56; *Cole v. City of La Grange*, 113 U. S. 1, 5 S. Ct. 416.

In the case of Thompson v. Consolidated Gas Company (supra), this Honorable Court struck down a Texas statute which required, in effect, that gas pipeline companies must share their market with other producers in the same field. The following language was copied from the opinion of this Honorable Court in that case:

> "Under each statute, if obeyed, the State takes from the pipe line owner the money with which the purchase is made, the money lost through curtailed use of properties developed at large expense, the money lost because of the drainage away from his land of the gas which he is forbidden to produce for himself, but must buy from those towards whose lands it migrates.
>
> "Our law reports present no more glaring instance of the taking of one man's

> property and giving it to another. * * * And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."

The decision of the Court of Civil Appeals is squarely in conflict with *Marrs v. Railroad Commission*, 142 Tex. 293, 177 S. W. (2d) 941, where the Texas Supreme Court said:

> "Under the settled law of this State oil and gas form a part and parcel of the land wherein they tarry and belong to the owner of such land or his assigns (31 Tex. Jur. 518; Texas Co. v. Daugherty, 107 Tex. 226, 176 S. W. 717, L. R. A. 1917F, 989; Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566; Lemar v. Gardner, 121 Tex. 502, 50 S W. (2d) 769; Hager v. Stakes, 116 Tex. 453, 294 S. W. 835); and such owner has the right to mine such minerals subject to the conservation laws of this State. Every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation. Gulf Land Co. v. Atlantic Ref. Co., 134 Tex. 59, 131 S. W. (2d) 73; Railroad Commission of Texas, et al., v. Gulf Production Co., 134 Tex. 122, 125, 1932 S. W. (2d) 254.
>
> "Under the findings of the trial court the allowables as fixed by the Railroad

Commission for the two areas are entirely out of proportion to the potentials thereof. They are not in proportion to the oil under the different areas. It is very evident that petitioners are not being permitted to mine their just proportion of the oil. There is several times as much oil underlying petitioners' land as there is under the land in the Church-Fields area yet those in the Church-Fields area being permitted to mine nearly as much oil as are petitioners. As the oil is taken from the depleted Church-Fields area it is replaced by oil drained from petitioners' property. If petitioners were free to fend for themselves they could mine the oil under their land and thus prevent its escape to the adjoining area. But the order of the Railroad Commission here complained of prevents petitioners from so doing. As a result, petitioners are being forever deprived of their property. It is the taking of one man's property and the giving it to another. * * *

"This is not a case of mere waste in which the Commission has exercised the sound discretion invested in it to conserve our natural resources. As previously stated, the orders of the Railroad Commission here complained of have the effect of taking one's property and giving it to another under the circumstances where the evidence shows that this is not necessary in order to conserve the natural resources. In Thompson v. Consolidated Gas Co., 300 U. S. 55, 80, 57 S. Ct. 364, 376, 81 L. Ed.

> 510, 524, it was said: 'And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.' See other authorities cited therein.
>
> "It follows that the orders of the Railroad Commission here complained of are invalid, and the trial court properly struck them down."

Therefore it appears from the face of the opinion of the Court of Civil Appeals that Rule 15 results in a taking of Appellant's property for the private use of the Townsite operators and that such taking is contrary to the provisions of the Due Process clause and the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States. The questions presented by this appeal involve the constitutional rights of Appellant and are substantial.

VI.

Opinion Appended

Copy of the opinion of the Court of Civil Appeals, reported as Railway Commission of Texas, et al v. Humble Oil & Refining Company, et al, 193 S. W. (2d) 824, is printed as an appendix hereto.

WHEREFORE, Appellant prays that the appeal be

allowed, and that the judgment of the Court of Civil Appeals be reversed and the judgment of the trial court affirmed.

Respectfully submitted,

J. A. RAUHUT,
Brown Building,
Austin, Texas,

NELSON JONES,
402 Humble Building,
Houston, Texas,

Counsel for Appellant, Humble Oil & Refining Company.

APPENDIX

No. 9528

RAILROAD COMMISSION OF TEXAS ET AL, Appellants

vs.

HUMBLE OIL & REFINING COMPANY ET AL, Appellees

APPEAL FROM 53RD JUDICIAL DISTRICT COURT, TRAVIS COUNTY

This is an oil proration suit challenging the validity of an order of the Commission (Railroad Commission of Texas), dated August 3, 1944 (copied in full in note below*) amending its previous order prorating the field allowable of the Hawkins field

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* Rule 15. (a) The proration unit shall be twenty (20) acres, and no acreage shall be assigned to a unit which is more than one thousand fifty (1,050) feet from a producing well. A tolerance of ten (10) acres on the last well on producing tracts of more than twenty acres shall be allowed where the size and shape of the tract so warrants. Where tolerance is allowed, no acreage shall be assigned to the unit or the last well which is more than twelve hundred eighty (1280) feet from the well. Units which do not contain as much as twenty acres shall be considered as fractional units. Acreage units or fractions thereof whether containing more or less than twenty acres will be considered, for proration purposes, on the basis of the actual acreage assigned to the individual unit or fractional unit.

(b) Provided, however, that for the period of the War Emergency or for the period of P.A.W. restrictions on drilling, and for a period of not to exceed six months following the termination of said emergency or the lifting of the P.A.W. restrictions on drilling, any well which, as a result of such restrictions, has been required to have available

in Wood County among the wells in that field (other than marginal and high gas-oil ratio wells, not here involved), upon what is popularly termed a 50-50 basis; that is, in substance, allocating one-half the daily allowable on a per well basis and the other half upon a surface acreage basis. The spacing rule in the field (concededly proper by all parties) was twenty acres. Under this formula a well on less than one acre was given one-half the allowable of a well on 20 acres; or, stated differently, a well on a 20-acre tract could not have in excess of double the allowable of a well upon a tract of less than one acre; the acreage allowable being allocated upon the basis of 5% per acre up to and including 20 acres. The amendment of August 3, 1944, which was predicated upon the Federal P.A.W. (Petro-

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for assignment to it not less than forty surface acres may receive credit in the allocation program for the entire forty acres assigned to the well for drilling purposes so long as the two points farthermost removed from each other and contained in such drilling unit are not in excess of 2087 feet apart.

(c) The total daily field allowance as fixed by the Commission, after deductions have been made for marginal wells, wells incapable of making their allowable, and high gas-oil ratio wells, shall be distributed to the remaining wells in the field on the following basis: To each remaining well in the field X barrels of oil shall be allocated. In addition to X barrels each of these remaining wells shall receive an amount of allowable oil equal to five (5%) per cent of X barrels for each acre in the unit up to and including twenty acres.

(d) Provided, however, that for the period of the War Emergency or for the period of P.A.W. restrictions on drilling, and for a period of not to exceed six months following the termination of said emergency or the lifting of the P.A.W. restrictions on drilling, any well which may be as-

leum Administration for War) order (M68) denying priorities for drilling material on tracts less than 40 acres, increased the acreage allowable of one well on a tract of more than 20 acres by 10% for each additional acre up to and including 40 acres. The effect of this amendment, which by its terms will expire six months after the termination of the present emergency or "the lifting of P.A.W. restrictions on drilling," was to give one well on a 40-acre tract twice the allowable of a well on a 20-acre tract or four times the allowable of a well on a tract of less than one acre. This formula, except for the 40-acre amendment of August 3, 1944, had been in effect since February, 1941, shortly after the field was discovered, except for a slight amendment, not here important, made in April 1941. P.A.W. Rule M68 was promulgated in December 1941.

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signed forty acres under the provisions of paragraph (b) hereof shall, in addition to the allowable accruing to such well by application of the provisions of paragraph (c) hereof, be assigned an allowable equal to ten per cent of X barrels for each acre assigned such well above twenty acres.

(e) It is the intent of this order to provide that a well to which twenty acres has been assigned shall not receive an allowable greater than twice that which has been assigned to a well on a tract less than one acre, that a well to which there has been assigned as much as thirty acres shall not receive an allowable greater than two and one-half times the allowable of a well to which has been assigned less than one acre, and that a well to which forty acres has been assigned shall not receive an allowable greater than four times that which is assigned to a well on a tract less than one acre.

It is further ordered that this cause be held open on the Docket for such other and further orders as may be necessary and supported by evidence of record. Railroad Commission of Texas.

The suit was brought by the Humble (Humble Oil & Refining Company, the largest producer in the field) against the Commission and its members. Several royalty owners intervened as parties plaintiff adopting the pleadings of the Humble; and a number of operators owning leases on small tracts in a densely drilled portion of Hawkins townsite, intervened as parties defendant.

The Humble's petition states that the effect of the amendment, under the present field allowable, is demonstrated by the following table:

	.1 Acre	.5 Acre	1.0 Acre	20 Acres	40 Acres
Schedule daily allowable under former order	65	66	67	130	130
Schedule daily allowable under amendment	46	47	48	92	184

And further:

"The Hawkins Field in Wood County, Texas, consists of approximately 9500 productive acres and on February 1, 1945, the field contained 405 producing oil wells. The Hawkins townsite, which is divided into small lots and blocks, occupies approximately 137 acres of said field and contains 91 of said wells. Eighty-seven of these townsite wells were drilled on a total of 73.7 acres. The field outside the townsite, consisting of approximately 9363 acres, contained 314 producing oil wells on February 1, 1945. All of the wells in the Hawkins Field, including the townsite wells, produce from one common reservoir."

The suit is predicated upon the assertion that the

order is confiscatory as between large and small tracts, against the former, which are chiefly owned by Humble, and in favor of the latter, in that it denies to Humble "a fair chance to produce its share of the oil in said common reservoir, with the result that plaintiff's properties are suffering net, uncompensated drainage to the wells of said townsite operators at the rate of approximately 2,500 barrels of oil per day."

The judgment cancelled the order appealed from and granted ancillary injunctive relief upon jury findings upon two special issues, that if allowed to remain in effect during the life of the Hawkins field the order will:

1. Prevent Humble "from producing the recoverable oil now in place under its land, or the equivalent in kind of such oil"; and

2. Prevent the operator of wells on any tract in which any one of certain designated parties (plaintiff-interveners) "owns royalties or working interests from producing the recoverable oil now in place under such tract, or its equivalent in kind of such oil."

The Commission and defendant-interveners have appealed.

In the main the grounds of error relied upon by appellants may be substantially stated in the following four contentions; in the first of which the Commission does not join:

1. Since no issue of waste, but only that of correlative rights is involved, the Humble and others interested in the field are estopped from questioning

the order, because they agreed among themselves upon the formula prescribed by the order and urged and acquiesced in its adoption by the Commission. This defense was stricken out on exception to defendant-interveners' pleadings.

2. It was error to exclude evidence of such agreement and position taken before the Commission, since it had material bearing upon the reasonableness of the order and the exercise by the Commission of its discretionary power in making it.

3. The order was not unreasonable or confiscatory, but was well within the discretionary powers of the Commission, and should have been upheld as a matter of law.

4. The proper test whether the order was confiscatory was whether it afforded Humble and others a *fair opportunity to produce*, and not (as presented in the special issues) whether it would *prevent them from producing* the recoverable oil or its equivalent underlying their lands. This contention is raised in objections to the special issues and refusal of requested special issues and explanatory charges.

We are sustaining the third of these contentions; and since the other three under this holding are without controlling effect we will state our views thereon only generally.

As to the first: We held in Commission v. Mackhank, 186 S. W. (2d) 351, that where no issue of conservation is involved, owners of adjoining leases may execute contracts, binding between themselves, with reference to their correlative rights. The case was taken to the Supreme Court upon another issue, as to which the decision of that court

was expressly limited. 190 S. W. (2d) 802. We refer to our opinion in that case for our views upon this question. In our opinion neither the facts alleged nor those offered in evidence in the instant case embrace the essential elements of contract or estoppel, which were clearly present in the Mackhank case. Generally speaking, and without going into extended detail, the allegations and proffered evidence were to the effect that shortly after the field was discovered and prior to the first proration or spacing order, there was a meeting at the Hawkins schoolhouse of all or practically all parties interested in the field, at which the question of the proper spacing and proration order was thoroughly discussed, and an agreement was reached substantially in accordance with the Commission order; and that this formula was presented to the Commission and acquiesced in by the Humble; its attorney making certain statements commendatory of its fairness both in the first Commission hearing, and later when the first amendment of the order was made. At a hearing before the Commission in February 1942, a petition signed by all but two of plaintiff-interveners alleged:

"Heretofore you have issued field rules for the Hawkins Field in Wood County, Texas. These rules allocate the allowable production among the wells in the field by employing a formula which it was contemplated would ultimately allow a well on twenty acres to produce about two times as much oil as a well on one acre or less in the Hawkins townsite. The order was entered by the Commission after a full hearing and after the operators and royalty own-

ers involved had agreed in principle to such an allocation formula."

This petition was presented by Humble's attorney, who stated to the Commission at the time:

"The present basis of allocation in the field was worked out as a compromise measure between those who hold acreage in the townsite and those who hold acreage outside the townsite; and it was unanimously, as I remember, recommended to the Commission by operators in the townsite and outside the townsite. It was felt at the time that, in view of the fact that it would be necessary to drill more wells inside the townsite than outside the townsite, some concession should be made to that fact, and, as a basis, an allocation was agreed upon and was sanctioned by the Commission which give a certain percentage of the allowable of the field to the townsite area and the remaining percentage to the area outside of the townsite."

It was alleged that no substantial change in the situation affecting the propriety of the original order had subsequently taken place, other than P. A. W. Rule No. M68, which was taken care of in the 1944 amendment; and that investments had been made and vested rights had accrued in reliance upon the binding effect of this agreement and position taken before the Commission.

If for no other reason than the fact that there was no consideration for the alleged agreement, it was clearly not binding as between the parties to it, and therefore was wanting in an essential element of estoppel. And since it was not binding upon the parties, and created in them no vested right to the

continuance of the formula, it furnished no valid basis for reliance upon such continuance in favor of anyone thereafter dealing with the oil properties. The Commission's power to regulate oil production in the interest both of conservation and of protecting correlative rights is a continuing one, and its proration orders are subject to change, modification or amendment at any time, upon due notice and hearing, either upon the Commission's own motion or upon application of an interested party. This principle is now so well established as to require no citation of authority. It should also be noted that each of the proration orders governing the Hawkins field contained the following provision:

"It is further ordered that this cause be held open on the docket for such other and further orders as may be necessary and supported by evidence of record."

Thus each order carried on its face notice to everyone thereafter dealing with properties in the field, that it was subject to appropriate change.

If, as contended by appellees, the evidence conclusively shows the invalidity of the order, then the alleged agreement and position taken before the Commission became immaterial and evidence thereof was properly excluded.

On the other hand, if the evidence was of such character as to support a finding either upholding or cancelling the order, it would seem clear that what the parties themselves thought of the propriety of the order or were willing to accept as being substantially just and fair to them, would have a material evidentiary bearing on the controversy. This would be

especially true of the Humble whose interests in the field were a great deal larger than those of all the other operators combined; and who appears to be in better position to evaluate the various factors involved than anyone else. And this we think is true whether the validity of the order be tested by the substantial evidence rule or the independent judicial factual review rule. The factors involved are considered later under the third contention.

We also hold that the fourth contention should be sustained. As we construe the first special issue (and the same applies to the second), it called for a determination whether the Humble could under the order produce the recoverable oil in place underlying its lands, or its equivalent. In effect this was submitting the issue whether there existed, under the order, uncompensated excess drainage away from the lands of the Humble to other portions of the field. While there was sharp conflict in the testimony upon several factual issues, there was no conflict regarding the issue of substantial uncompensated excess drainage. All the witnesses testified, and appellants admit in their brief, that there was such drainage, although not conceding the extent thereof as testified to by Humble's witnesses. If therefore this issue constituted the only factor involved in determining the validity of the order, then appellee's contention that its invalidity was conclusively shown would be correct, and require an affirmance of the judgment. The proper test of the order's validity, as we construe the adjudicated cases on the subject, is whether it denies to Humble (and others) a fair opportunity to produce its recoverable oil. In deter-

mining whether the order affords such fair opportunity there are several pertinent factors other than embodied in the special issues. These are considered below, under our holding sustaining the third contention; but for which holding a remand of the cause for a new trial would be required under our holdings sustaining the second and fourth contentions.

The third contention requires a more extended consideration of the evidence than that contained in its meagre presentation above. The statement of facts is in two large volumes, 1326 of its 1375 typewritten foolscap pages constituting a question and answer transcription of the testimony of the witnesses, of whom there were six, three for appellees (Mr. Morgan J. Davis, Humble's chief geologist, Dr. Alexander Deussen, a consulting petroleum geologist, and Mr. Stuart E. Buckley, head of Humble's production research department) and three for appellants (Dr. Byron B. Boatright and Mr. Kenneth R. Teis, consulting petroleum geologists, and Mr. Jack Baumel, the Commission's Director of Production and Chief Engineer of the Oil and Gas Division). Additionally, there are many exhibits consisting of maps, charts, compilations, etc. The case was manifestly fully developed from the viewpoint of a factual presentation of everything actually known or which apparently could have been known regarding the field up to the time of trial, having any bearing upon the issues involved in the several contentions of the parties. While we shall endeavor to give an overall picture of the situation with sufficient specification to a clear understanding of what

we hold the controlling issues in the case, and shall point out the major conflicts in the testimony, it will not be necessary, in our view of the case, to set forth the evidence or even its substance in any extended detail.

The Hawkins structure is a large dome about 4.8 miles long (NE-SW) and 4 miles wide (E-W). It is highly faulted. One large fault on the E. side of the field has a maximum displacement of about 400 feet and divides the field into two areas known as East and West Hawkins. There appears to be no substantial migration between the two areas. The other faults are of varying displacement, some of them 100 feet and more. The production is from the Woodbine sands about 4,000 feet below sea level, or about 4,400 beet below the surface. The woodbine is divided between two horizons, the upper known as Lewisville and the lower as Dexter. Both horizons contain oil, but the Lewisville is largely impervious shale interspersed with oil producing sand lenses. The Dexter is interspersed with impervious shale lenses. The average producing sand thickness in the Dexter is about 107 feet. At about 4,400 feet sub-sea level is a tarry or asphaltic substance from three to ten feet thick, which separates the underlying water from the oil producing sands. The boundary between the Lewisville and Dexter follows the general domal outline of the structure and intersects the water level near the edges of the field, beyond which intersection and extending around the outskirts of the field production is only from the Lewisville. So far there is no water drive in the West Hawkins areas, due to this tarry layer. There

is a water drive in the East Hawkins area, and such is the case in all other Woodbine fields throughout East Texas. At the top of the dome and overlying the oil producing sands is a gas cap. In the West Hawkins the only natural lifting power of the oil in production is from gas pressure in the expansion of this gas cap and the release of gas in solution, there being no water drive in this area. Near the center of the field is a large free gas area from which there is no oil production. Several wells drilled in the producing area were dry holes. The townsite contains 137 acres, 63.26 is owned by T. & P. Ry. Co., and is under lease to Humble. It has five wells, no more being authorized. The remaining 73.74 acres is cut up into small tracts separately owned and has 87 producing wells. The rest of the field, with negligible exception, consists of large tracts. These 87 wells had been drilled prior to the effective date of Rule M68, up to which time the Humble had been diligent in drilling its properties in accordance with the 20-acre spacing, but had not completed such drilling. As a result, there were a number of wells it was cut off from drilling because of failure to get priorities for material under this rule. It was upon showing of such inability that the 40-acre amendment to the proration order was passed in August 1944. The Commission had granted no exceptions to the spacing rule, except those that were required to protect vested rights; that is one to each segregated tract, however small; but not more than one well on any such tract. Each of the wells in the densely drilled 73.74 acres was drilled in accordance with this rule.

The overall general picture regarding recoverable reserves and drainage as presented by Mr. Davis was that Humble's properties contained 76.5% of the recoverable reserves of the entire field; whereas, under the proration order in issue it was allowed only 71.4% of such recoverable reserves, which, if continued during the rest of the life of the field (estimated at about 27 years) would result in drainage from Humble properties to the thickly drilled portion of the townsite of some 30,000,000 barrels of Humble's oil. Neither the method by which nor the data upon which this calculation was based is questioned; but only the variableness of the conclusions or estimates deduced therefrom. The method was to take an estimated percentage of the oil in place, as the amount of recoverable oil, either under the whole field or under any particular tract therein. The first step in this method was to estimate the total volume of producing sand expressed in acre feet per surface acre. The data from which this estimate was made was derived from electrical logs of each well called Schlumbergers. Since these logs only show the sand thickness in the area occupied by the well bore, a relatively insignificant portion of the area involved, it is necessary to make the estimate by averaging the sand thickness between wells from the thicknesses shown by the adjacent well logs. This is the only possible method, and it is concededly subject to wide variation from actual underground conditions, largely accentuated by the unusually faulted condition of the field. Mr. Davis testified that the general average would be approximately correct, for the reason that overestimate in one area would be com-

pensated by underestimate in another. On the other hand, Mr. Teis testified that due to the highly faulty character of the field this averaging involved a substantial probability of error. He illustrated this by calculations from logs in a 20-acre area in the townsite having 26 wells. By taking only one central well in the tract and one well on each abutting 20 acres, and then taking all the 26 wells and adjoining offset wells, there was a difference of 15% in the result. As to this particular tract the smaller spacing gave the larger figure. He testified, however, that there was no way of determining whether the figure would be the same or reversed, if the method could be applied to the 20 or 40-acre drilled tracts.

The percentage of recoverable oil of the oil in place, was calculated from estimates of the following factors: sand porosity; shrinkage or saturation; viscosity of the oil. Sand porosity involved two factors, the actual percentage of void between the sand grains less the percentage of connate water. The first of these factors involved a laboratory test not necessary to detail, of a small sample of sand, and so far as the particular sample was concerned, the test was reasonably accurate. However, all witnesses agreed that the amount of connate water was largely a guess. Mr. Buckley testified that the percentage of connate water had no appreciable bearing upon the amount of recoverable oil except where a very high percentage (about 80%) was reached. No other witness corroborated this testimony, and it was expressly contradicted by Mr. Teis. There was a wide variability in permeability and viscosity throughout the field; and it was admitted by Hum-

ble's witnesses that estimates based upon some of these factors were subject to wide margins of error. Mr. Davis testified, however, that any such errors would be mutually compensatory under general average of the entire field.

Another substantial conflict was in estimating productivity during the life of the field. Humble's witnesses testified that they did not believe there would ever be a water drive in West Hawkins, and that the townsite 73.74 acres would be productive during the entire life of the field. Appellees' witnesses believed, on the contrary, that there would later be a water drive; but that regardless of a water drive, the life of the townsite 73.74 acres would be shortened below that of the rest of the field by some ten years due to its position on the structure, and the heavier withdrawals, which would accelerate the gas encroachment and result in earlier drowning out of that area. It was conceded, however, by Mr. Davis that no other field in the Woodbine had been drilled and produced under the same formula, or had been exhausted, and that only experience could demonstrate what would actually happen in these regards.

It was shown that the original cost of drilling and equipping a producing well in the field was approximately $20,000; that a spacing pattern of 10 acres would require Humble to drill some 500 wells in addition to those required under the 20-acre spacing; or a total original cost of some $10,000,000. There was no showing as to the operation cost of wells in production. There was no attempt on the part of appellees to show what would be the result upon the field of its development without restriction as to well

spacing or production; what would probably be either the total production from the large and small leases or the relative amount of such production as between such leases or as compared with the formula in issue. Dr. Boatright testified in this regard:

"In view of the fact that the townsite sand has as good or better characteristic as the balance of the field, has a much thicker sand section than the average of the field, and has a potential history that is better than the average of the field, and a much greater percentage of the wells than they are now getting of the production, I don't think there is any question but what under unrestricted production the township would produce more oil if the restrictions were taken off than it would produce under the present Railroad Commission order."

He testified further that he could not estimate the recovery from any particular lease, without knowing what Humble's drilling program would be under such circumstances.

It will be observed that the proration formula as to acreage is based upon surface acreage and not upon acre feet of producing sand, or recoverable reserves. Mr. Baumel testified that such a proration formula would be impractical. No suggestion was made by any of the appellees that the formula be changed from a surface acreage basis to an acre foot of sand basis. Their only suggestion as to a proper formula was to change the relative percentage from the 50-50 basis by increasing the acreage allowable to say 60% and reducing the per well allowable to 40%, which, the evidence showed could be done without waste. There was no showing as to

the minimum allowable essential to keep wells in production, or to make such production profitable.

It was also shown that the total well potentials of Humble's wells was only 59.65% of the total well potentials in the field; whereas Humble was getting under the formula 71.4% of the total allowable. The Humble contends that these figures have no bearing on the controversy for the reason that the potentials were not taken on "open flow tests," but only for the purpose of determining whether a given well would produce its allowable. The fact that Humble has only 61.82% of the total wells in the field while given 71.4% of the allowable is also discarded by Humble as having no bearing on the controversy.

While we have given in main outline the principal points of difference in the testimony between the experts introduced by the respective parties, we are assuming, for our present purposes, the correctness of the facts and the estimates and conclusions drawn therefrom as testified to by Humble's witnesses.

The general legal principles applicable to the factual situation here presented, we believe, are now well settled by the adjudicated cases. They may be briefly summarized as follows:

Oil in place belongs to the owner of the soil, but due to its fugacious nature is subject (absent conservation restrictions) to the unlimited right of capture. Both this ownership (title) and unlimited right of capture are property rights, and neither can be infringed except in a proper administration of our conservation laws. See Brown v. Humble Oil & Refining Co., 126 Tex. 293, 83 S. W. (2d) 935, Corzelius v. Harrell, 186 S. W. (2d) 961.

Rule 37 (spacing rule) and the exception thereto to prevent confiscation of property (as also waste, not here involved) as well as the limitation of production through proration, have been uniformly upheld, as valid exercises of the police power in the interest of conservation of a natural resource. Any restriction upon the number of wells drilled or the amount of production therefrom is essentially an infringement upon the right of private property, and can only be upheld as a conservation measure. In the exercise of this right of curtailment it is generally recognized that the rules and regulations adopted must, as far as practical, and within reasonable limitations, afford the several property owners a fair opportunity to produce the recoverable oil underlying their lands or its equivalent.

As a corollary to these rules, it is held that the owner of an "involuntarily" segregated tract cannot be denied the right to drill at least one well on his tract however small it may be. From which it would seem that his allowable can not be cut down to the point where his well would no longer produce (see Commission v. Mackhank, 190 S. W .(2d) 802), nor below the point where it could not be drilled and operated at a reasonable profit.

There are certain natural advantages which the small tracts have over large tracts in unrestricted production; and we think these natural advantages may properly be taken into consideration in administering the conservation laws. Oil in place, though owned by the soil owner, cannot be produced except at great cost depending upon the depth from which it must be mined. This cost places practical limita-

tions upon the right of capture which are as cogent as any other involved factor. It is not only by no means certain, but hardly within the range of reasonable probability, that in this field, where the small tracts are all concentrated in one small area, the Humble would go to the expense of drilling sufficient offset wells to prevent the townsite owners from producing as much as they will produce under the order in suit. Certainly they would not drill to the same density as the townsite tract. Whether this would be necessary to prevent all drainage does not appear. Mr. Davis testified that the townsite was draining the remote areas of the field. The mere drilling of offset wells to those in the townsite would accelerate this drainage. Just what effect unrestricted production would have on the field was not shown and probably could not be shown. However, the restriction in production and the retarded orderly withdrawals from the field, were in the interest of conservation, preventing waste, and effecting a greater ultimate recovery than would be had under unrestricted production. The large tract owners would share the larger in this benefit. The evidence does not afford the means of evaluating these factors and probably means for such evaluation could not be obtained. That they do afford a substantial advantage to the large tract owners we have no doubt. Another advantage of proration is restricting production to market demand. It is a matter of history that unrestricted production in the East Texas field reduced the market price of oil to 8 cents per barrel.

Independently of these considerations, however, there is another factor compensatory of the dis-

parity in withdrawals between large and small tracts, the means for evaluating which are more tangible; namely, the saving in cost of production under the 20-acre spacing pattern and proration order. On a 20-acre tract the cost of production of a given amount of oil is only half of that on a tract of less than one acre, which latter is four times the cost on a 40-acre tract. As illustrative of the effect of this factor the evidence shows that the saving in original cost, exclusive of operation cost, to Humble alone between drilling on a 20-acre spacing pattern and on a 10-acre spacing pattern would amount to approximately $10,000,000. To evaluate this saving it would have to be capitalized at a reasonable rate of interest and amortized over the period of the life of the field (27 years). Against this investment, at most, is the 5% of additional recoverable reserves (30,000,000 barrels of oil) the production of which would be spread out over the same 27 years.

The conservation orders of the Commission are presumptively valid, and before they can be set aside by the courts, their invalidity must clearly be shown. Judge Sharp expresses this rule in Corzelius v. Harrell, 186 S. W. (2d) 961, as follows:

"The Railroad Commission is not required in administering the oil and gas statutes to be absolutely accurate in its rules and orders. This would be impossible. It is the duty of the Commission to treat all interested parties justly and impartially, and the actions and rulings of the Commission in attempting to accomplish such results will not be disturbed by the courts unless such rules or orders are clearly illegal, unreasonable, or arbitrary. The power to make

rules rests exclusively with the Railroad Commission."

See also Sun v. Potter, 189 S. W. (2d) 482.

The responsibility for the proper administration of the conservation laws rests primarily with the Commission. What factors shall be considered, and their proper evaluation are matters exclusively within the Commission's discretion and not subject to judicial review, so long as they bear a reasonable ralation to the subject matter of the order. In the Brown case, above, Judge Sharp used this language:

"There are many factors, facts, and circumstances, which we shall not undertake to detail here, in each case and in each hearing, which must be considered, weighed, and given effect, in the fair and reasonable administration of such laws, rules, and exceptions. All questions of fact are primarily for the commission to determine."

The following is from Chief Justice Alexander's opinion in the Marrs case (Marrs v. Commission, 142 Tex. 293, 177 S. W. (2d) 941):

"The responsibility rests with the Commission to devise some scheme of proration that will conserve the oil in the field in question, and at the same time will be fair and just and will not deprive petitioners of their property. There are many and varied methods that may be adopted by the Commission to accomplish this purpose. This necessarily involves the exercise of the discretion that has been committed by the Legislature to the Commission, and it would amount to a usurpation of the Commission's power by the court, for the court to undertake to prescribe the terms of such an order. As heretofore

stated by this Court, in passing on the validity of any scheme that may be worked out by the Commission for the handling of this problem, a reasonable margin will be allowed for differences in opinion and errors in judgment."

And this from Judge Hickman's opinion in the recent case of Commission v. Mackhank, 190 S. W. (2d) 802:

"The Court cannot strike down an administrative order on the ground that the evidence heard by the Court indicated that a more equitable one could be entered."

It has never been held that recoverable reserves constitutes the only factor to be considered in determining the validity of a proration order. And so far as we are aware no proration order has ever been made in which the allowable has been allocated in proportion to the recoverable reserves. The only evidence upon this subject was to the effect that allocation upon such basis would be impracticable. Nor is it contended by appellees that such basis should be adopted. As we understand their contention, there is no complaint of the order on the ground that it divides the total allowable upon a per well and surface acreage percentage basis; but only that the 50-50 formula does not give them their share of the recoverable reserves.

We believe the Marrs case is the only one in which the validity of an oil proration order allocating the field allowable has ever been adjudicated by our Supreme Court. Other than the Danciger Case (Danciger v. Commission, 49 S. W. (2d) 837), the earlier proration cases were brought in the federal courts.

The Danciger case was dismissed by the Supreme Court without adjudication of the merits. 122 Tex. 243, 56 S. W. (2d) 1057. Well potential was recognized as an appropriate factor to be considered in determining the validity of a proration order in the Marrs case; and proration orders based on well potentials have been upheld by the federal courts. See Danciger v. Smith, 4 Fed. Supp. 236, wherein Judge Hutcheson, writing for a three-judge court, said:

"* * * unlike the orders in those cases which apportioned the allowable to the field on a per well basis rather than in accordance with the potential of the wells, so as to give each well reasonably its proportion of the allowed production, this order distributed the allowable on a potential basis in an effort to fairly allocate to each producer that portion of the production which the situation and nature of his properties entitles him to have. It is therefore plain that it cannot be said that there is anything arbitrary or unreasonable on the face of the order, either in the amount of production to which a particular field is limited or in the method of its distribution."

As above shown appellees contend that potentials can not be considered in this case because not properly taken. Conceding this point arguendo; can it be reasonably said that appellees have established the invalidity of the order when no effort has been made by them to have the effect of this factor developed. See opinion of this court in Commission v. Mackhank, 186 S. W. (2d) 351.

Waving other issues aside, however, and consid-

ering only the compensatory effect of reduced drilling cost, and this independently of reduced operating cost, we think the order was well within the discretionary powers of the Commission in making it.

In reaching this conclusion we have assumed that the independent judicial factual review rule, laid down in the Marrs case, applies, at least in proration cases; and this even to the extent of passing upon the conflicting views and theories of expert witnesses.

It is interesting to note, however, that, although the same issue of confiscation is involved in Rule 37 cases where the permits are based upon the exception "to prevent confiscation of property," the substantial evidence rule has been uniformly applied. The latest expression of the Supreme Court upon this subject is that contained in the following language from Judge Sharp's opinion in Potter v. Sun, above:

"The decision in this case may be placed on the rule that if there is any testimony of probative force to sustain the order of the Railroad Commission and the judgment of the trial court, it is the duty of the courts to uphold such order and judgment, unless they are clearly illegal, unreasonable, or arbitrary."

It would appear that in dealing with an oil field consisting of a common pool it is essential to have uniformity in geological theory applied throughout the field. The Commission would clearly not be warranted in accepting the theory of one set of experts in passing upon the rights of one leaseholder, and rejecting that theory and adopting that of another set of experts in passing upon another's rights. It is the view of the writer that to this extent, at least,

the Commission's discretionary powers should not be subject to judicial review, and the substantial evidence rule should apply.

The following is from the Federal Supreme Court's opinion in the first Rowan & Nichols case, (310 U. S. 573, 60 S. Ct. 1021, 84 L. Ed. 1368):

"Certainly in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art, it would be presumptuous for courts, on the basis of conflicting expert testimony, to deem the view of the administrative tribunal, acting under legislative authority offensive to the Fourteenth Amendment."

The trial court's judgment is reversed and judgment is here rendered for appellants.

JAMES W. MCCLENDON
Chief Justice

Reversed and Rendered.
Filed: March 6, 1946.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1344

HUMBLE OIL & REFINING COMPANY, *Appellant*,

v.

RAILROAD COMMISSION OF TEXAS, ET AL., *Appellees*

On Appeal to the Supreme Court of the United States From the Court of Civil Appeals for the Third Supreme Judicial District of Texas

---

APPELLANT'S REPLY TO APPELLEES' OPPOSING STATEMENT AND MOTION TO DISMISS OR AFFIRM

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APPELLANT'S REPLY TO APPELLEES' OPPOSING STATEMENT AND MOTION TO DISMISS OR AFFIRM

Appellant, Humble Oil & Refining Company, replying to the opposing statement and motion to dismiss or affirm filed by appellees, would show:

Summary of Appellant's Reply

Contrary to appellees' contentions,

(1) The questions presented by this appeal were not settled adversely to appellant by the decisions of this Court in RAILROAD COMMISSION v. ROWAN & NICHOLS OIL CO.,

310 U.S. 573, 60 S. Ct. 1021; RAILROAD COMMISSION v. ROWAN & NICHOLS OIL CO., 311 U.S. 570, 61 S. Ct. 343; RAILROAD COMMISSION v. HUMBLE OIL & REFINING COMPANY, 311 U.S. 578, 61 S. Ct. 347.

(2) The decision of the Texas court has the effect of sanctioning a taking of appellant's property in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the CONSTITUTION.

I.

This Court has not heretofore ruled adversely to appellant's contentions, and the questions involved in the appeal are substantial.

Appellees in their Motion to Dismiss or Affirm contend that in three cases involving attacks on proration orders of the Railroad Commission of Texas for another oil field this Court has settled adversely to appellant the contentions raised in this case involving the proration order of the Railroad Commission relating to the Hawkins Field. (The ROWAN AND NICHOLS cases and the HUMBLE case governed by them, cited *supra*). In doing so the appellees misconstrued both the purport of the ROWAN AND NICHOLS cases and the basis for this appeal.

Under Texas law appellant is the owner of the oil and gas in place under its leases and is entitled to a fair opportunity to recover the oil and gas in or under its land. TEXAS COMPANY v. DAUGHERTY, 107 Tex. 226, 176 S.W. 717; BROWN v. HUMBLE OIL & REFINING COMPANY, 126 Tex. 296, 83 S.W. (2d) 935; MARRS v. RAILROAD COMMISSION, 142 Tex. 293, 177 S.W. (2d) 941; GULF LAND COMPANY v. ATLANTIC REFINING COMPANY, 134 Tex. 59, 131 S.W. (2d) 73.

Prior to the conservation laws, the means of producing the oil in place was governed by the common law right of capture. In all cases upholding the right of capture the courts have recognized the correlative rights of owners in an oil field. The courts held that ratable taking from a common reservoir of oil was to be achieved by permitting each producer to produce whatever he could from his own wells, drilled as he deemed fit. Other producers protected their correlative rights by drilling offset wells and producing headlong to prevent drainage by their neighbors. Thus the ability of one to capture was limited by the ability of all others simultaneously to capture. PRAIRIE OIL & GAS CO. v. STATE OF TEXAS, 231 S.W. 1088; TEXAS COMPANY v. DAUGHERTY, 107 Tex. 226, 176 S.W. 717; HARDWICKE, "RULE OF CAPTURE AND ITS IMPLICATIONS AS APPLIED TO OIL AND GAS," 13 Texas Law Rev. 401.

The conservation laws of Texas are designed to eliminate waste and to protect the correlative rights of all producers in a field subjected to administrative controls. The Legislature has delegated to the Railroad Commission powers, legislative in character, to control the spacing of wells (VERNON'S TEXAS CIVIL STATUTES, Article 6014), to limit the allowable production of an oil field (Id. Article 6049c), and to prorate the allowable production among the various producers "on a reasonable basis." (Id. Article 6049c, Section 7.) Proration "on a reasonable basis" has been uniformly interpreted as proration designed to accord each producer in a field opportunity to obtain without waste the oil in place beneath his lease or its equivalent in kind.

> "It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalent in kind." GULF LAND COMPANY v. ATLANTIC REFINING CO., 134 Tex. 59, 131 S.W. (2d) 73, 80.

In the ROWAN AND NICHOLS cases, the validity of proration orders for the East Texas field was challenged by appeal to the Fourteenth Amendment. In those cases the landowner contended that the proration orders were, by the weight of the evidence, unfair and confiscatory. In both cases this Court refused to sustain lower Federal Courts' "judicial judgment" in opposition to the "administrative judgment" of the Railroad Commission on the principle that where the evidence is conflicting the court will not overturn Railroad Commission orders.

In the first ROWAN AND NICHOLS case this Court said:

> "Certainly in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art, it would be presumptious for courts, *on the basis of conflicting expert testimony*, to deem the view of the administrative tribunal, acting under legislative authority, offensive to the Fourteenth Amendment." * (310 U.S. p. 581.)

Furthermore in that case the court stated:

> *"No less is there conflict in the evidence as to the solidity of respondent's apprehension that there will be drainage of oil beneath its surface by neighboring wells. The Commission's experts insist that the threat, if existent at all, is speculative, and that the Commission's power of continuous oversight is readily available for relief if real danger should arise in the future.*
>
> *"Plainly these are not issues for our arbitrament."* (310 U.S. 583.)

---

* All emphasis ours throughout this brief unless otherwise indicated.

That the same is true of the second ROWAN AND NICHOLS decision is demonstrated by the following language copied from the opinion of this court:

> *" * * * it is clear that the Due Process clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophecies and impressions of expert witnesses.*
> *"This record gives little justification for confidence in such testimony as the basis for jurisdictional dogmatism."* (311 U.S. 576.)

This court's opinion in the HUMBLE case (311 U.S. 578), consists merely of a statement that the case is ruled by the second ROWAN AND NICHOLS decision.

Thus this court did not hold in the cited cases that it would refuse to interfere with the confiscation of property by the Commission; neither the Commission, nor the Legislature itself, can write an order clearly confiscatory in character under the guise of an exercise of administrative discretion or judgment. This court, in the ROWAN and NICHOLS cases, held only that it would refuse to determine from conflicting evidence whether the Commission's orders in fact resulted in confiscation. In determining whether the challenged orders were confiscatory, the ultimate issue of fact in the ROWAN AND NICHOLS cases was whether such orders resulted in uncompensated net drainage of oil from Rowan and Nichols' lease. Stated in another way, the ultimate issue of fact was whether the challenged orders would prevent Rowan and Nichols from recovering a quantity of oil equivalent to the amount of recoverable oil originally in place beneath Rowan and Nichols' lease. It was contended by the Commission that Rowan and Nichols would recover under the challenged orders, "at least the equivalent of the recoverable oil originally in place beneath such lease." (85 L. Ed. 359.) If

that were true, the orders complained of were not confiscatory. According to the opinion of this court, there was evidence introduced in support of that contention and this court declined to determine the disputed issue of fact.

This appeal is not prosecuted as in the ROWAN and NICHOLS cases upon a challenge of the validity of an order promulgated by the Railroad Commission in the exercise of its administrative judgment when faced with "a conflict of expertise," and the appellant is not asking that the court substitute its judgment for that of the Commission as to any such conflict. This appeal is bottomed upon the results of a Commission order which are undisputed by the Commission and which appellant asks this court to find confiscatory, leaving to the Commission its administrative function of promulgating a proper proration order which will not have the results admitted by the Commission to be inherent in the order under attack.

Practically all of the Hawkins field involved in this case is drilled under a 20-acre spacing rule. The validity of the 20-acre spacing rule as a conservation measure is undisputed. Under exceptions to this rule the Commission has permitted the drilling of 87 wells in a townsite within the boundaries of the field having an average of less than one acre per well. Rule 15 is the proration order which was first promulgated shortly after the discovery of the Hawkins field and before full geologic data were available. The original Rule 15 prorated production on the basis of 50 per cent allocation to each well and 50 per cent to acreage; no change has been made in this basic formula.

It is conceded that Rule 15 already has resulted in substantial uncompensated excess drainage of oil in vast quantities from appellant's properties and that such drainage will continue so long as this Rule remains in effect. The *fact* that the challenged Rule results in the drainage of huge quanti-

ties of oil from appellant's leases to the wells of the townsite operators, thereby depriving appellant of any opportunity to recover the oil in place in its properties, is established by the undisputed evidence, the verdict of the jury, the admissions of appellees, and the findings made by the Court of Civil Appeals. There is no escape from the conclusion reached by the Court of Civil Appeals that:

> "While there was sharp conflict in the testimony upon several factual issues *there was no conflict regarding the issue of substantial, uncompensated excess drainage. All of the witnesses testified, and appellants* (Railroad Commission, et al.) *admit in their brief, that there was such drainage, although not conceding the extent thereof, as testified to by Humble's witnesses.*" (JURISDICTIONAL STATEMENT, Appendix, page 10, 193 S.W. (2d) 829.)

It was undisputed, and found by the court below, that Rule 15 is not necessary to prevent waste. As set forth in the JURISDICTIONAL STATEMENT (p. 16), the Court of Civil Appeals, having found that appellant's property is being taken without any justifying public purpose, nevertheless held that Rule 15 is valid because under another rule (the spacing rule), which is not involved in this suit, appellant has been "saved" a large sum in drilling expense.

It is submitted that the issues in this case, so well delineated by the decision of the Court of Civil Appeals, are substantial and have not been settled adversely to appellants in the ROWAN AND NICHOLS cases.

Appellees, however, propound the novel doctrine that the decision of the Court of Civil Appeals from which this appeal is taken, should be disregarded and that "the validity of the order as sustained by Texas courts must be said to rest upon its reasonableness in the light of the entire record and upon a consideration of all relevant factors." (Appellees' op-

posing statement, p. 6.) Appellees' opposing statement then proceeds to discuss the record in this case which is not yet before the court and the records in the ROWAN AND NICHOLS cases involving different issues under a different set of orders.

This case was first tried before a jury in a state district court. The trial court and jury found for the appellant. Appellees in appealing to the Court of Civil Appeals relied upon four contentions. The Court of Civil Appeals sustained only one, that the order was not unreasonable or confiscatory and was within the powers of the Commission. The Court of Civil Appeals found, as did the trial court, that appellant is suffering uncompensated excess drainage to the townsite operators but justified such drainage by alleged offsetting compensations flowing from the spacing rules. The Supreme Court of Texas denied applications to it for writs of error with the docket notation, "Refused. No reversible error." As appellees point out, under Texas practice such a notation indicates that, while the application presents no error which requires reversal, the Supreme Court does not agree that the Court of Civil Appeals in all respects has correctly declared the law. (Appellees' Opposing Statement, p. 5; Rule 483 of the TEXAS RULES OF CIVIL PROCEDURE, Vernon's 1946 Supplement.)

The appellees would deduce from this notation that the Supreme Court of Texas in concurring in the result decided that the record disclosed that the Commission's order was within the discretionary powers of the Railroad Commission, whether or not the single positive holding by the Court of Civil Appeals that "the compensatory effect of reduced drilling cost" made it so, is valid as a matter of law. However, under Texas practice, findings of fact by the Court of Civil Appeals are conclusive. NATIONAL COMPRESS CO. v. HAMLIN, 114 Tex. 375, 269 S.W. 1024. The Court of Civil Appeals found that there is substantial, uncompensated excess

drainage and that there is no dispute as to this between the parties. If the Supreme Court of Texas did not concur in the positive holding of law as to the compensatory effect of reduced drilling costs, there is nothing to indicate why it concurred in holding the order was "reasonable" within the meaning of the state statute. In any event, appellant now comes before this court for relief under the Fourteenth Amendment from the ruling of the Court of Civil Appeals as applied to the undisputed facts of substantial, uncompensated excess drainage.

Appellees in moving to dismiss or affirm, ignore the decision of the court from whom the appeal is taken and purport to show the similarities in the record in this case and in the ROWAN AND NICHOLS cases. Detailed references to the record in this case are made in an effort to show a conflict in expert testimony so as to bring the case within the rule of the ROWAN AND NICHOLS cases. However, this court, with the motion to dismiss or affirm before it, does not yet have the record before it. If there is to be dispute over the content of the record it should be when the case is heard upon appeal and the record is available.

Actually the record does not support appellees' contentions. As has been quoted *supra*, the Court of Civil Appeals stated that "while there was sharp conflict in the testimony upon several factual issues, there was no conflict regarding the issue of substantial uncompensated excess drainage." If it be appropriate to refer to detailed testimony in the record, testimony of appellees' own witnesses is replete with statements substantiating the finding of the lower court. These witnesses conceded that Rule 15 is not necessary to prevent waste and will cause appellant to lose millions of barrels of oil by drainage. (R. 1405, 1340, et seq., 1703, et seq., 1784, et seq.)

Instead of referring to the records in the ROWAN AND

NICHOLS cases, appellees might more appropriately look to their statements as to the law of Texas made in those cases. There Rowan and Nichols Co. contended that it was entitled to excessive drainage or migratory oil to its leases in the East Texas field. The Railroad Commission in its brief filed in this court by Mr. James Hart, then Assistant Attorney General of Texas, in the second ROWAN AND NICHOLS case stated:

> "Rowan & Nichols Oil Company has recovered and is recovering its fair share of the total field allowable under the Railroad Commission's plan of proration, and, if the plan of proration attacked is continued in effect, Rowan & Nichols Oil Company will recover from the wells drilled on its lease at least the equivalent of the recoverable oil originally in place beneath such lease." (Brief for Appellants, No. 218, in the Supreme Court, October term, 1940, pp. 33-34.)

On page 35 of the same brief the Commission stated its position in the following language:

> "It is our position that the Railroad Commission is not legally required to prorate on the basis of current reserves and that it may properly consider in framing the plan of proration the amount of oil ultimately to be recovered by each section of the field. *If the Rowan & Nichols Oil Company, considering the entire production from its leases, will obtain an amount of oil equivalent to the recoverable oil originally beneath its leases, it will have received the full measure of its legal rights. Brown v. Humble Oil & Refining Co.*, 126 Tex. 296; *Gulf Land Co. v. Atlantic Refining Co.*, 134 Tex. 59."

On page 60 of the above mentioned brief the Commission said that the adoption of the formula contended for by

Rowan and Nichols *"would result in the confiscation of the property of other operators"* because ultimately it would allow Rowan and Nichols to produce more than the quantity of recoverable oil originally under the Rowan and Nichols lease.

The above quotations from the Commission's brief in the second ROWAN & NICHOLS case are found also in the Commission's briefs in the first ROWAN & NICHOLS case and the HUMBLE case. The Commission was able to prevail in those cases only because it convinced this court that, in the expert opinion of the Commission, the complainants ultimately would produce their oil in place or its equivalent and, therefore, were not the victims of confiscation.

Now the Railroad Commission, in defense of its orders in this case, has completely reversed the position it maintained successfully in the ROWAN & NICHOLS cases. In this case, as a result of the Commission's orders, the producers on townsite locations in the Hawkins field are enjoying migratory oil from substantial uncompensated excess drainage. It is admitted that as a consequence appellants will be unable to recover "an amount of oil equivalent to the recoverable oil originally beneath its leases" and it would appear that this "would result in the confiscation of the property" of appellants. However, appellees argue in their motion that there is no essential difference between appellant's basic contentions and the claims of the complainant in the ROWAN & NICHOLS cases. Appellees would liken appellant's contention here to the claim of Rowan and Nichols that a proration order must be based upon acre feet of sand in order to be valid. This argument of appellees is merely an effort to avoid the real issue. Appellant has not requested the courts to write another proration order for the Hawkins field. Nor has appellant suggested any factors which must be included in the Hawkins order. Appellant has confined itself to a complaint that the order in

suit is invalid because it results in the confiscation of appellant's property in accordance with the statement of law hitherto adhered to by the Railroad Commission. The appellants are prepared to show that according to the record and the opinion of the court below, it would be a simple matter for the Commission to reduce the drainage of appellant's oil without causing waste. However, appellant is not espousing any particular formula or factors. As this court pointed out in the ROWAN AND NICHOLS cases and, as the Supreme Court of Texas said in MARRS V. RAILROAD COMMISSION (supra) it is not the function of the courts to write proration orders for the Commission; it is the function of the courts to declare invalid any order which admittedly takes oil from one operator and gives it to another.

It is clear that substantial questions are raised; whether the taking of millions of barrels of appellant's oil for the private use of the townsite operators, when such taking is not necessary to prevent waste, on the ground that appellant is "compensated" for the loss of its oil by reason of "reduced drilling expenses" under the spacing rule is in violation of the due process clause of the Fourteenth Amendment, and whether admitted substantial, uncompensated excess drainage of oil from appellant's properties to the wells of the townsite operators, where such drainage could be reduced or prevented without waste, denies the appellant its rights under the equal protection and due process clauses of the Fourteenth Amendment. It is equally clear that these questions have not been settled adversely to appellants by the ROWAN AND NICHOLS cases.

It is submitted that the motion to dismiss or affirm on the ground that questions presented have been settled in prior decisions be denied and the appeal allowed so that this appellant may have its day in court on the constitutional issues raised herein.

II.

The decision of the Texas Court has the effect of sanctioning a taking of appellant's property in violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

In the opposing statement (p. 14) Appellees appear to argue that (1) testimony in the record demonstrates that, were there no proration and if the rule of capture prevailed unrestricted, the drainage from appellant's property would have been [illegible] than under Rule 15, (2) therefore, Rule 15 does not cause drainage, (3) the rule of capture is still a property right enjoyed by appellees, (4) by virtue of the rule of capture townsite operators under local law are entitled to the fruits of "substantial uncompensated excess drainage" to their wells, and (5) therefore the decision of the Court of Civil Appeals is based upon a non-federal ground.

(1) In resorting to citations from the record appellees again ignore the decision of the lower court. The Court of Civil Appeals found "Just what effect unrestricted production would have on the field was not shown and probably could not be shown." (193 S.W. (2d) 832.) And it is immaterial what unrestricted production might have produced; once conservation laws impose restrictions to prevent waste.

> " * * * every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalents in kind, and that any denial of such fair chance would be confiscation." RAILROAD COMMISSION OF TEXAS v. GULF PRODUCTION COMPANY, 134 Tex. 122, 132 S.W. (2d) 254.

(2) Under Rule 15 there is admitted excess drainage. The

lower court held (193 S.W. (2d) 832) and appellees admit that Rule 15 as drafted is not needed to prevent waste, and furthermore appellees concede that Rule 15 could be readily amended to *reduce* drainage. (Appellees' Opposing Statement, p. 15.) To the extent Rule 15 does not *reduce* excess drainage it is causing the excess drainage against which appellant seeks relief. In GULF LAND CO. v. ATLANTIC REFINING CO., 134 Tex. 59, 131 S.W. (2d) 73, the Supreme Court of Texas said:

> " * * * the term 'confiscation' evidently has reference to depriving the owner of a fair chance to recover the oil and gas in or under his land. *It is evident that the word refers principally to drainage.*"

(3) The rule of capture concededly is still a property right enjoyed by appellees and appellants alike, but for both the rule is limited by the rule of ratable taking under conservation laws. In BROWN v. HUMBLE OIL & REFINING CO., 126 Tex. 296, 83 S.W. (2d) 935, the Texas Supreme Court defined in clear, unmistakable language the "rule of capture" and the property rights acquired under that rule when it said:

> " * * * The exercise of the police power under this rule (Rule 37) does not change the rule of property. It merely regulates and controls the way in which his property shall be used and enjoyed. Each person still owns the oil and gas in place under his land, and each still has the right to possession, use, enjoyment, and ownership of the oil and gas produced through wells located on his land, regardless of its origin. The primary rule of ownership is still operative. The rule of convenience becomes secondary.
>
> "Conditions may arise where it would be proper, right, and just to grant exceptions to the rule so as to permit wells to be drilled on smaller tracts than pre-

scribed therein. Also, conditions may arise where it would be proper, right, and just to permit tracts to be subdivided and such subdivisions drilled after the adoption of the rule; but in all such instances it is the duty of the commission to adjust the allowable, based upon the potential production, so as to give to the owner of such smaller tract only his just proportion of the oil and gas. By this method each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land. * * *

"The Commission, in order to prevent waste, has the power to limit the rate of flow in the same way that it has the power to regulate spacing. See Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062, 86 A.L.R. 403; Danciger Oil & Refining Co. v. Railroad Commission (Tex. Civ. App.), 49 S.W. (2d) 837. This right to control the rate of flow in order to prevent waste also enables the Commission to offset the advantage obtained by one who is given an exception to the spacing rule by limiting his allowable production to the extent necessary to overcome this advantage. In this way the commission, by controlling the oil stored in the common reservoir, is enabled to carry out the dominant purpose of preventing waste, and, at the same time, permit each owner to enjoy the opportunity fully to realize upon his estate by developing and recovering his oil and gas."

cf. BURFORD v. SUN OIL CO., 319 U.S. 315, 322 63 S. Ct. 1098, 1101.

(4) The townsite owners' claim to "share in the migration of oil" is contrary to Texas law, as set forth in the cases quoted and cited above. RAILROAD COMMISSION v. MAGNOLIA PETROLEUM CO., 169 S.W. (2d) 253, cited by appellees, does not support the contention of appellees. This is clear both upon the facts of that case and from subsequent cases

by the same court interpreting the Magnolia decision. MILLER v. RAILROAD COMMISSION (T.C.A.), 185 S.W. (2d) 223, 226; KRAKER v. RAILROAD COMMISSION, 188 S.W. (2d) 912.

(5) "Uncompensated drainage" is a taking of property. The Court of Civil Appeals found this "reasonable" because of alleged savings in drilling costs. Appellant here contends that such alleged "savings" are chemerical* and irrelevant. Under the Fourteenth Amendment, its property cannot be confiscated for private use by Commission order on any theory that under other Commission orders there might be some savings to which it would be entitled in any event. THOMPSON v. CONSOLIDATED GAS CO., 300 U.S. 55, 57 S. Ct. 364.**

Appellees say on page 17 of their motion to dismiss or affirm that on the question of appellant's property rights in oil, the holding of the Texas court is final, citing FOX RIVER PAPER CO. v. RAILROAD COMMISSION, 274 U.S. 651, 47 S. Ct. 669. Appellees would lead this court to believe that the Court of Civil Appeals held that, under Texas law, the Commission is not required to restrict each operator to the oil in place beneath his lease, or the equivalent in kind thereof. The error of this contention is apparent from the following language from the opinion of the Court of Civil Appeals:

> "The general legal principles applicable to the factual situation here presented, we believe, are now well settled by the adjudicated cases. They may be briefly summarized as follows:

---

* Under the lower court theory appellant apparently is to be content with savings from not drilling wells for oil it is not to receive.

** "And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." 300 U.S. 55, 80, 57 S. Ct. 364, 376.

"Oil in place belongs to the owner of the soil, but due to its fugacious nature is subject (absent conservation restrictions) to the unlimited right of capture. Both this ownership (title) and unlimited right of capture are property rights, and neither can be infringed except in a proper administration of our conservation laws. See Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W. (2d) 935, 87 S.W. (2d) 1069, 99 A.L.R. 1107, 101 A.L.R. 1393; Corzelius v. Harrell, Tex. Sup., 186 S.W. (2d) 961.

"Rule 37 (spacing rule) and the exception thereto to prevent confiscation of property (as also waste, not here involved) as well as the limitation of production through proration, have been uniformly upheld, as valid exercises of the police power in the interest of conservation of a natural resource. Any restriction upon the number of wells drilled or the amount of production therefrom is essentially an infringement upon the right of private property, and can only be upheld as a conservation measure. *In the exercise of this right of curtailment it is generally recognized that the rules and regulations adopted must, as far as practical, and within reasonable limitations, afford the several property owners a fair opportunity to produce the recoverable oil underlying their lands or its equivalent.*" (193 S.W. (2d) 832.)

The issues raised herein are not and can not be settled upon any non-federal ground.

Jurisdiction of this Court lies upon this appeal. State procedure has been followed from the Railroad Commission to the State Courts. The judgment of the Court of Civil Appeals, here sought to be reversed, became final upon refusal of the Supreme Court of Texas of an application for writ of error and is the judgment of the highest court of the State of Texas in which a decision of this suit could be made. However, ultimate review of the Federal questions is fully preserved by this Court. MATHEWS v. RODGERS, 284 U.S.

521, 52 S. Ct. 217; BURFORD v. SUN OIL CO., 319 U.S. 315, 63 S. Ct. 1098.

Conclusion

In conclusion, it is clear under Texas law that the only basis upon which the Commission may restrict appellant's production is (1) to prevent waste or (2) to protect correlative rights, that is to prevent excessive noncompensated drainage.

The court below found, and appellees concede, that the Commission's order is not necessary to prevent waste according to the *undisputed facts*. The court below also found that Rule 15 *causes* excessive noncompensated drainage and that on this issue the evidence is undisputed.

It is an undisputed *fact* that appellant has drilled all of the wells which it can drill under spacing regulations and all the wells it needs to produce its share of the oil without waste.

The Court of Civil Appeals tries to justify the arbitrary and confiscatory order on the *sole ground* that appellant had saved money by drilling on a 20-acre pattern, thus holding that the Commission could take appellant's oil and give it to the townsite operators when it was not necessary to do so to prevent waste and when in doing so it destroyed correlative rights in violation of the Commission's mandatory duty.

Thus, the *sole issue* in the case is the confiscatory character of Rule 15 in violation of the due process and equal protection clauses of the Constitution. There *is no issue of fact.*

Appellant has exhausted its efforts for relief in the state courts, for the state Supreme Court has denied application for writ of error, and the judgment of the Court of Civil Appeals has become final under the law of Texas.

Thus appellant has been obliged to turn to this Honorable

Court for protection of its Constitutional right to be protected against an arbitrarily confiscatory order. The Federal question is clearly presented; and, as has been shown, the injury to appellant is very substantial.

Wherefore, for the reasons stated above it is respectfully submitted that Appellees' Motion to Dismiss or Affirm should be denied and the Appeal be allowed.

Respectfully submitted,

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FILE COPY

MAY 7 1947
CHARLES ELMORE GROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

Nos. 1344-1345

HUMBLE OIL & REFINING COMPANY, ET AL.,
Appellants,

vs.

RAILROAD COMMISSION OF TEXAS, ET AL.,
Appellees

ON APPEALS FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLEES' OPPOSING STATEMENT AND MOTION TO DISMISS OR AFFIRM

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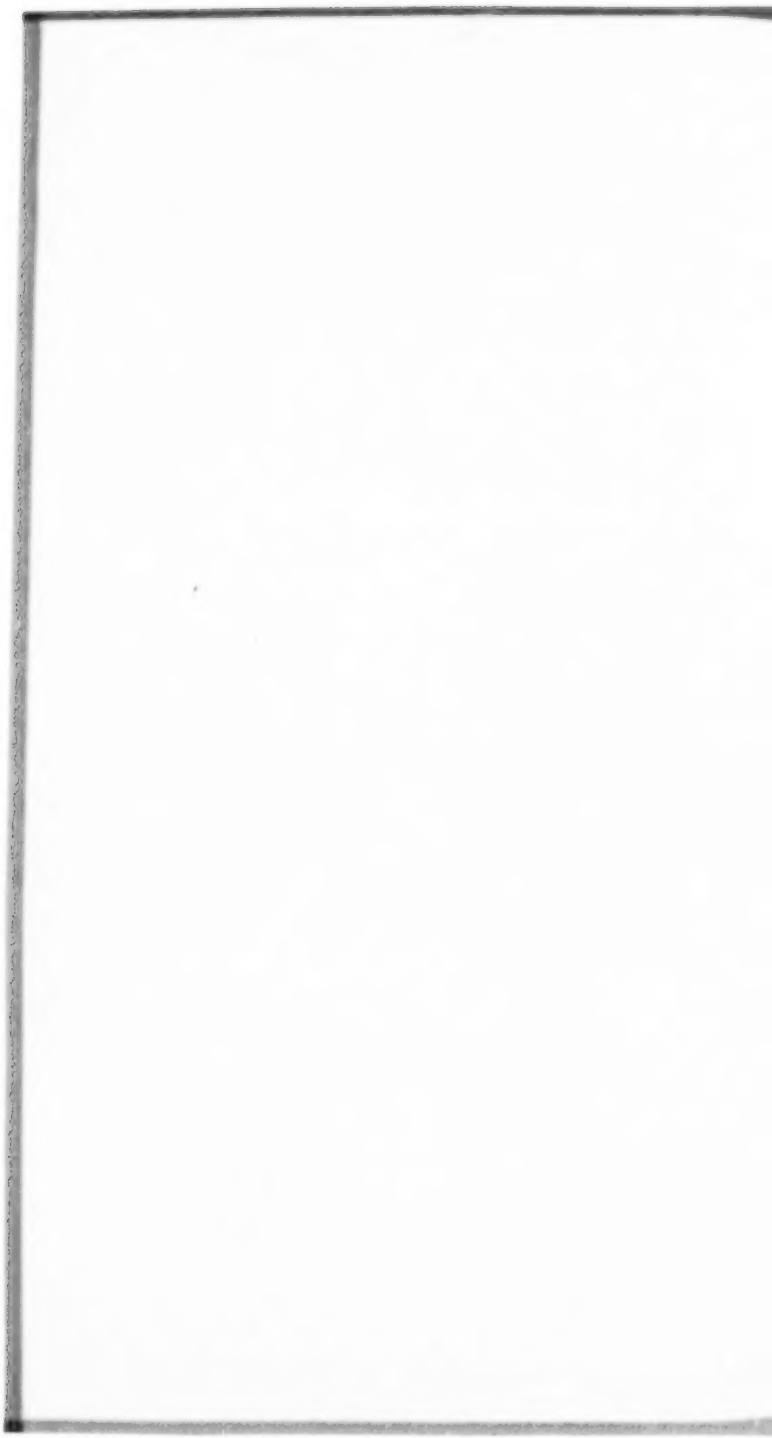

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

Nos. 1344-1345

HUMBLE OIL & REFINING COMPANY, ET AL.,
Appellants,

vs.

RAILROAD COMMISSION OF TEXAS, ET AL.,
Appellees

ON APPEALS FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLEES' OPPOSING STATEMENT AND MOTION TO DISMISS OR AFFIRM

The appellees, the Railroad Commission of Texas and its members and the Attorney General of Texas, and Charles F. Ashcroft, et al., respectfully submit this statement and motion to dismiss or affirm, under Rule 12 of the Rules of this Court, and say:

Summary Statement of Appellees' Contentions

(1) *The questions presented by the appeal are not substantial, because they have already been settled adversely to appellants by the decisions of this Court in Railroad*

Commission v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 311 U. S. 614; *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570; *Railroad Commission* v. *Humble Oil & Refining Co.*, 311 U. S. 578.

(2) *The Texas courts having decided that appellants' property rights, as determined by the Texas law of property, are not being denied or confiscated, the decision of the Texas courts rests upon an adequate and substantial non-federal ground.*

This case presents the question of the validity under the Fourteenth Amendment of a proration order of the Railroad Commission for the Hawkins field dividing the allowable production of oil among the various operators on what is popularly known as a 50-50 basis—that is, 50% per well and 50% on the basis of acreage. Appellants' essential complaint against the proration formula is that it gives too much weight to the per-well factor and not enough weight to the acreage factor, with the result that the appellants on their large tracts are allowed to recover less, and the townsite operators on their small tracts are permitted to recover more, than they would recover if the production were allocated in proportion to estimates of recoverable oil in place beneath their respective tracts.

It is the appellees' position that under earlier decisions by this Court, the Railroad Commission's order is reasonable and well within the limits of the Railroad Commission's proper discretion, and that, the Texas courts having decided that none of appellants' property rights are being denied to them, the case turns on a question of Texas property law on which the decision of the Texas courts is final.

I

The Questions Raised by Appellants Have Been Decided Adversely to Them by Earlier Decisions of This Court

An examination of the opinions in the *Rowan & Nichols* and *Humble* cases, cited above, and a comparison of the facts in those cases with the facts in this case, will show that substantially the same attacks were made there upon proration orders much less favorable to the owners of large tracts than the order in this case, and that this Court specifically rejected the claims of unconstitutionality there presented.

Earlier Decisions by This Court

1. *First Rowan & Nichols Case*

In the first *Rowan & Nichols* case, 310 U. S. 573, the order, relating to the East Texas field, was substantially "on a flat per well basis" (See 310 U. S. at pp. 578, 582). The validity of the order under the Fourteenth Amendment was specifically attacked (See 310 U. S. at p. 577). The complaint against the order was that it permitted "other leaseholders, more leniently treated, to capture oil at a more rapid rate than is possible for the respondent, thereby draining away oil which underlies respondent's leased lands" (See 310 U. S. at p. 578), and that the result of the order was to give "a constitutionally inadmissible advantage to smaller and more densely drilled tracts as against those owned by respondent" (See 310 U. S. at p. 582).

Rejecting these claims of unconstitutionality, and recognizing the implications of "the rule of capture" as an integral part of the law of property in oil and gas in Texas, this Court held that "a flat per well allowance to these producers was not an unnatural answer to the problem" (See 310 U. S. at p. 583) and that, "It is not for the federal

courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better" (See 310 U. S. at p. 584).

2. *Second Rowan & Nichols Case*

In the second *Rowan & Nichols* case, 311 U. S. 570, the court was confronted with a proration order, again relating to the East Texas field, which was somewhat more favorable to the larger tracts than the order involved in the first case. Instead of being about 98% on a per-well basis, as in the first order, the second order was about 75% on a per-well basis and 25% on other factors, including acre feet of sand (See 311 U. S. at p. 574). Rejecting again the contention that the small tracts were unduly favored and that the per-well allowable "constituted an illegitimate discrimination against high producing and thinly drilled areas" (See 311 U. S. at p. 574), this Court reversed the judgment of the lower court and ordered the dismissal of the complaint. In the course of its opinion, this Court pointed out the following considerations as being relevant to the problem of the small tracts (See 311 U. S. at pp. 574-575):

> "The surface is often divided into small tracts, and the Commission, acting under the authority of the Texas statutes, has permitted the drilling of wells by small owners in order to prevent practical forfeiture of their interests. Small producers have investments in existing wells with low capacities, and these wells need a minimum daily production to justify their enterprise. In addition to all this, any scheme of proration duly mindful of all those considerations, hardly mathematically commensurable, which constitute the total well-being of a society, must assure the continued operation of a sufficient number of wells for an adequate exploitation of the state's oil resources."

3. *The Humble Case*

The *Humble* case, 311 U. S. 578, was a companion case to the second *Rowan & Nichols* case, involving the same proration order, and the Court disposed of it in a brief opinion, referring to that case.

The Present Case

1. *Summary of Proceedings in State Courts*

Following the repulses of the attacks on proration orders in the federal courts in the *Rowan & Nichols* and *Humble* cases, the forum for the settlement of the controversy over proration was shifted back to the Texas courts. In *Marrs* v. *Railroad Commission,* 142 Tex. 293, 177 S. W. (2d) 941, the Supreme Court of Texas set aside a proration order for the McElroy field because the order did not, in the opinion of the court, give proper weight to (a) the potential productivity of the complainant's wells under unrestricted conditions and (b) to the relative proportion of the recoverable reserves of oil in place beneath their tracts.

Shortly after the decision in the *Marrs* case, the present case was brought by Humble and some of its royalty owners attacking the proration order in the Hawkins field. The District Court after a lengthy trial, set the proration order aside. The Court of Civil Appeals, after holding that procedural errors had occurred in the District Court which otherwise would have required a new trial, held further that the evidence, when viewed most favorably to the Humble and its royalty owners, did not justify the setting aside of the Railroad Commission's order, under the holding in the *Marrs* case, and therefore reversed and rendered the judgment of the District Court. *Railroad Commission* v. *Humble Oil & Refining Co.,* 193 S. W. (2d) 824. Applications for writs of error were made to the Supreme Court of Texas

by Humble and its royalty owners. In the meantime, the Supreme Court of Texas, after the decision in the *Marrs* case, in two decisions involving the well-spacing rules, held that orders of the Railroad Commission of Texas under the oil and gas conservation statutes will not be set aside by the courts if such orders are supported by substantial evidence showing such orders to be reasonable. *Thomas* v. *Stanolind Oil & Gas Co.*, 198 S. W. (2d) 420; *Trapp* v. *Shell Oil Co., Inc.*, 198 S W. (2d) 424 (Original opinions, May 15, 1946; motions for rehearing overruled November 27, 1946).[1] On December 18, 1946, the Supreme Court of Texas, in the present case, denied the applications for writs of error with the docket notation, "Refused. No reversible error" (R. 2231), the judgment reciting that the Supreme Court of Texas finds "that the applications present no error which requires a reversal of the judgment of the Court of Civil Appeals . . ." (R. 2067, 2103).

The appellants, Floy K. Williams, et al., are incorrect in stating on page 12 of their Jurisdictional Statement (R. 2185) that the applications for writs of error were denied with the simple notation, "Refused." This is material under the Texas practice, because of the provisions of Rule 483 of the Texas Rules of Civil Procedure (Vernon's 1946 Supplement), which provides in part as follows:

> "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused.' *In all cases where the Supreme Court is not satisfied with the*

[1] Compare the decisions of this Court applying the substantial evidence rule to cases involving attacks on orders of federal administrative agencies. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; *Federal Security Administration* v. *Quaker Oats Co.*, 318 U. S. 218; *Federal Communications Commission* v. *WOKO, Inc.*, 328 U. S. — (No. 65, October Term, 1946, decided December 9, 1946).

opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application with the notation '*Refused. No reversible error.*'"[2]

The action of the Supreme Court of Texas in the present case therefore is not an endorsement by the Supreme Court of all of the principles of law announced or relied upon by the Court of Civil Appeals. In fact, the notation made by the Supreme Court of Texas necessarily means that in some respects the Supreme Court of Texas did not approve of the reasons given by the Court of Civil Appeals in its opinion, although the Supreme Court of Texas did agree with the result reached by the Court of Civil Appeals. All that can be said with certainty is that upon the whole record the Supreme Court of Texas decided that as a matter of law the evidence showed that the Railroad Commission's order was within the discretionary powers of the Railroad Commission and should not be set aside. The decision of the present case by the Texas courts cannot be said to rest (as appellants contend, Humble's Jurisdictional Statement, pp. 17, 21, R. 2138, 2142; Floy K. Williams, et al., Jurisdictional Statement, p. 10, R. 2183) upon any single declaration of law by the Court of Civil Appeals, such as its reference to the compensatory factor of the saving of drilling costs to the Humble, as supporting the present order; but, on the contrary, the validity of the order as sustained by the Texas courts must be said to rest upon its reasonableness in the light of the entire record and upon a consideration of all relevant factors. We shall discuss the order upon this basis, in view of the earlier decisions of this Court.

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[2] All emphasis in this motion is ours.

2. *Comparison of Facts in This Case with Facts in Earlier Decisions of This Court*

The essential complaint asserted by the Humble and its royalty owners is the same as the complaint in the cases previously decided by this Court: viz., that the order allocates too much of the allowable on a per-well basis rather than on the basis of acreage or acre-feet of sand, resulting in a recovery by wells on small tracts of more than their fair share of the recoverable oil. The clear applicability to the present case of the reasoning followed by this Court in its previous decisions is shown by the following comparisons:

(a) *Approximate percentage of allowable production distributed on a per well basis:*

First *Rowan & Nichols* case—98%
Second *Rowan & Nichols* case—75%
Present case—50%

(b) *Approximate percentage of allowable production distributed on an acreage basis:*

First *Rowan & Nichols* case—none (the allowable above the flat per well allowable being distributed on the basis of 2.32% of the hourly potential capacity of each well).

Second *Rowan & Nichols* case—less than 25% (the balance of the allowable above the 75% distributed on a per-well basis being distributed on a formula involving well potentials, sand thickness, and bottom-hole pressure, as well as acreage).

Present case—50%.

(c) *Differences in allowables granted to wells on small tracts and large tracts:*

First *Rowan & Nichols* case—minimum allowable to all wells capable of making it—20 barrels; highest allowable, determined by well potential and not by acreage of tract—25 barrels (See Record in that case, No. 681, October Term, 1939, p. 983).

Second *Rowan & Nichols* case—minimum allowable to all wells capable of making it—20 barrels; highest allowable—50 barrels (See Record in that case, No. 219, October Term, 1940, p. 325).

Present order—allowable to well on smallest tract—46 barrels; allowable to well on 40 acres—184 barrels.

To summarize, the wells on larger tracts fare much better under the formula in this case than they would have fared under the orders involved in either of the *Rowan & Nichols* cases. The *per well factor,* which favors the smaller tracts, is only 50% in this case as compared with 98% in the first *Rowan & Nichols* case and 75% in the second *Rowan & Nichols* case; the *acreage factor,* which favors the larger tracts, is 50% in this case, as compared with no allowable on this basis in the first *Rowan & Nichols* case and less than 25% in the second *Rowan & Nichols* case; and the wells on the smallest tracts receive only 25% of the allowable of wells on the largest tracts in this case, whereas in the first *Rowan & Nichols* case the wells on the largest tract might or might not receive any more than the well on the smallest tract, depending on the potential of the well, but in no event would a well with the minimum allowable receive less than 80% of the maximum well allowable, and in the second *Rowan & Nichols* case, the minimum well allowable was not less than 40% of the allowable granted to the well having the largest acreage and all other factors in its favor.

Nor is there any essential difference between the basic contentions of the appellants here and the claims of the complainants in the earlier cases. In the first *Rowan & Nichols* case, this Court states the complainant's contention as follows (310 U. S., at p. 578):

> "Only an allocation based on acre-feet of sand or its equivalent would be a reasonable means of measuring the oil in place beneath the respondent's leases; and

any formula failing to do this takes respondent's property without due process of law."

In the present case, the suit was brought by Humble Oil & Refining Company, seeking a judgment "decreeing void and invalid" any orders of the Railroad Commission "which deny to Plaintiff the right to produce substantially the total daily allowable that the recoverable oil in and under its property bears to the recoverable oil in the field . . ." (R. 12-13).

The plaintiff interveners, Floy K. Williams, et al., who are royalty owners in Humble leases, adopted the allegations in the Humble's petition (R. 17) and likewise prayed that the court decree "void and invalid" any rules or regulations of the Railroad Commission which deny to the operators of wells on interveners' said properties "the right to produce substantially the proportion of the total daily allowable that the recoverable oil in and under the interveners' several properties bears to the recoverable oil in the field . . ." (R. 23).

There is no substantial difference between the claim that proration should be on the ground of acre-feet of sand and the claim that it should be on the basis of estimates of recoverable oil, because the estimates of recoverable oil relied upon by the appellants in this case were simply arrived at by multiplying the estimated number of acre-feet of sand beneath a lease by a constant "recovery factor" of 500 barrels per acre-foot (R. 574-575). In other words, any proration order, to be in proportion to recoverable reserves as estimated by appellants, would also have to be in proportion to their estimates of acre-feet of sand.

As in the *Rowan & Nichols* cases, the estimates of "reserves" and "drainage" are uncertain and conjectural at best. Many uncertain factors are involved, as stated in the opinion of the Court of Civil Appeals. The Humble's

present estimates of recoverable reserves vary by 21% from their original estimates made soon after the field was first opened (R. 930). Mr. Davis, the Humble's chief geologist, admitted that his method of calculating reserves and drainage had never been verified as against actual production so as to tell whether it was 20% or 30% or 50% wrong (R. 880). With regard to recoverable oil in any lease, Mr. Davis admitted that an estimate which was only 20% or 30% above or below the true facts would be "reasonably close" (R. 841-842). This may be contrasted with the fact that Humble's percentage of the allowable is only about 5% less than its estimates of its percentage of the total reserves (71.4% as against 76.5%). Mr. Davis furthermore admitted that the calculations appearing in Humble's exhibits, where "drainage" is calculated down to the exact barrel, are merely "a matter of accounting" (R. 628) and Mr. Davis furthermore admitted that in figuring the "drainage" on any lease, *he could easily be wrong in his estimates by a million barrels, one way or the other* (R. 632-633). These inherent uncertainties in calculations and estimates are not due to any want of experience or ability on the part of Humble's experts, but to the fact that estimates of this kind cannot be made except within very wide limits of possible errors, even by the most competent experts.

Carried to its logical conclusion, appellants' contention would mean that the townsite operators would be permitted to produce currently and ultimately only in proportion to estimated reserves in place. This would mean that the allowable production of a well on a small townsite tract would be only about one-half of one barrel per day (R. 653) and this allowable would not, of course, be sufficient to pay expenses (R. 655). In the state courts, and also apparently in this Court, the appellants have shrunk from carrying their argument to its logical conclusion and have suggested

that the proration order would be valid if the acreage factor was increased to say 60% and the per well factor reduced to say 40% (See Humble's Jurisdictional Statement, p. 13, R. 2134; and Floy K. Williams, et al., Jurisdictional Statement, p. 10, R. 2183). After all is said and done, therefore, the present suit is one where appellants have asked the courts to substitute their discretion for the discretion of the Railroad Commission and, in effect, to direct the Railroad Commission to add a little more weight to the acreage factor in its formula, thereby further restricting the townsite operators and further increasing the allowable of the Humble wells. The state courts have held that this is a matter which is properly within the discretion of the Railroad Commission and is not a matter for judicial interference. We can see no reason for this Court to depart from the rule which it stated in the second *Rowan & Nichols* case (311 U. S., at p. 576), that, ". . . —it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophecies and impressions of expert witnesses."[3]

Other considerations are referred to in the opinion of the Court of Civil Appeals, which support the reasonableness of the Commission's order. A factor which has universally heretofore been recognized as being proper in proration formulas is *the number of wells* on each lease. The cost of the drilling of these wells is a large part of the investment which is necessary in order to recover the oil from its subterranean reservoir. Humble has drilled only 61.82% of the wells in the field, but it is permitted to recover 71.4% of the total allowable, or approximately 10% more than it

[3] Compare the statement by the Supreme Court of Texas in *Trapp* v. *Shell Oil Co.*, 198 S. W. (2d) 424, 432: "In such an appeal it is not for the trial court to substitute its judgment for that of the Railroad Commission on controverted issues of fact."

would be enttiled to receive on a pre-well basis of allocation (R. 761, 1260). By reason of the proration formula, the Humble on its large leases is receiving for each of its wells as much as four times the allowable permitted to the townsite wells for each dollar invested in drilling costs. Based on the figures given in Humble's Exhibit No. 4 introduced at the trial (R. 1848), the Humble, under conditions existing at the time of the trial, would receive ultimately an average estimated production of about 1,310,000 barrels of oil per well outside of the townsite, as contrasted with an estimated 470,000 barrels per well approximate ultimate recovery from wells in the townsite.

Another factor which, as the Court of Civil Appeals points out, has always been considered as a proper factor in proration formulas is the *potential capacities of the wells* involved. The official Railroad Commission records show that the Humble wells have only 59.63% of the total well potentials in the field (R. 1261), although Humble is permitted to produce 71.4% of the total allowable from the field, or about 12% of the total allowable more than it would be able to produce if the allowable were distributed on the basis of the potentials of the wells.

3. *Humble's Royalty Owners*

Some of Humble's royalty owners, who are the appellants Floy K. Williams, et al., intervened in the suit in the District Court, adopted the Humble's pleadings (R. 17), and prayed for substantially the same relief as Humble.

Based on the method of calculating "drainage," hereinafter referred to (p. 14), the Humble experts testified that such Humble leases, in which these royalty owners have interests, would not recover the equivalent of the estimated recoverable oil originally in place beneath these leases. The Humble witness was not able to say, however, which of

the leases of these parties would not recover the equivalent of his estimate of the recoverable oil in place (R. 911), although he thought that "most of them" would not recover this amount of oil (R. 911). However, there was no definite evidence as to any one of the royalty owners whether such royalty owner would, during the life of the field, considering his total interests in various leases, be permitted to recover more or less than the recoverable reserves originally in place. On at least two of these leases (Slaughter and Henry leases) the evidence shows lower pressures than in the townsite and the probability that oil is being drained towards these leases instead of away from them (R. 1050).

Actually, the major part of such drainage as will take place will be between Humble leases, due to the migration of oil caused by the expansion of the gas cap as oil is produced. For example, Humble's Exhibit No. 12 (R. 1865) is a table of estimated "losses" of oil by certain Humble leases, which estimated losses total about 60,000,000 barrels, but the same table shows that the drainage to the townsite (including the Humble's 21 wells in the townsite) is estimated at about 30,000,000 barrels. Since it is undisputed that Humble owns practically all of the leases or property outside of the townsite, it is evident from this table that such drainage as will take place will go largely from one Humble lease to another, and not to the townsite.

Dr. Boatright testified that "there is very little, if any, migration from the plaintiff-interveners' leases to the townsite at the present time, and under present distribution of pressure," and that "if we consider the production that has occurred from plaintiff-interveners' leases, together with the oil that is probably in place there today, they have substantially the same amount, or will recover substantially the same amount of oil as they would have recovered under original conditions—that is the total quantity" (R. 1251).

Considering the evidence as a whole, while there was evidence of drainage to some extent to the townsite, there was no evidence that any of the plaintiff interveners would suffer net loss or damage, considering his or her interest in various leases in the field. There was never any specific proof as to the exact nature of the interests which the plaintiff interveners owned in the field, except generally that they owned royalty or other similar interests in Humble leases. In this connection, attention is called to the fact that there has never been any attack upon the spacing rule, which provides for the drilling of one well to 20 acres, except where separate ownership of smaller tracts requires denser drilling. It may be that it would be to the interest of the royalty owners to have the Humble drill its leases more densely, if they have any right to make such requirement under their leases. However, it affirmatively appears that no effort has ever been made to have the Railroad Commission amend the spacing rule to permit closer drilling on large tracts (R. 1766).

Finally, it is submitted that the validity of a proration order must be judged by its over-all effect rather than its effect upon a particular lease or group of leases. A proration order must necessarily be applied to an entire oil field.

After discussing some of the complexities involved in devising and applying spacing and proration rules, this Court said in *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 319:

> "For these, and many other reasons based on geologic realities, *each oil and gas field must be regulated as a unit for conservation purposes.*"

It is impossible to devise any plan which may not in particular instances result in inequalities. Proration orders must be judged by a standard of general fairness of the method of allocation. We submit that the reasoning of

Mr. Justice Holmes in the case of *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430, 434, is in point:

> "A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvements is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act, it would be surprising if the corresponding facts should invalidate an assessment. *Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things.* And this has been the implication of the cases."

Unless the foregoing general principle is followed in cases of this kind, it is submitted that the application of proration rules will be practically impossible. Regardless of the general fairness of a proration order, some owner of a small fractional interest in some tract, acting on his own motion or jointly with the oil company which is dissatisfied, might be able to show that by some standard the particular lease in which he is interested is not recovering the amount of oil which it should recover. If this were taken as the sole test of the validity of the proration order, then it might easily happen that some oil company, acting through a royalty owner or a person having a joint working interest with it in a particular lease, might be able to have the proration order set aside, although such order, when considered with regard to the field as a whole, or the leases of the oil company as a whole, is eminently fair and just. It

is submitted that there could be nothing more destructive of uniformity and fairness of administrative action.

It is submitted, therefore, that Humble's royalty owners present essentially the same case as Humble, and that their contentions do not afford substantial constitutional grounds for nullifying the Railroad Commission's action.

II

The Decision of This Case Rests on an Adequate Non-federal Basis

The appellants' contentions with regard to drainage are merely one aspect of their contentions that proration must be on the basis of estimates of recoverable reserves in place. The principal witness offered by the appellants to prove the existence of drainage was Mr. Morgan Davis, Chief Geologist for the Humble, who testified that he calculated drainage in the following manner (R. 669):

> "Now, the drainage was calculated this way: I took the *percentage of the field allowable* that these Townsite leases now have, and subtracted from that the *percentage that they owned in the original recoverable oil,* and, therefore, assume is owned in the present reserve, which gave another percentage figure, and *multiplied that times the field reserve,* which came out with *the amount of oil drained.*"

The respondents did not admit that the method of calculation of drainage used by the appellants was the proper method of calculating such drainage, nor did they admit that the amount of drainage estimated by the Humble to the townsite would actually take place. It was conceded, as stated in the opinion of the Court of Civil Appeals, that net uncompensated drainage is taking place to the townsite in substantial amounts, but it was shown by the uncontradicted testimony of the experts testifying for respondents that

the amount of such drainage was less than would have existed in the absence of any regulation by the Railroad Commission, if each operator were free to fend for himself. In this connection, Dr. Byron B. Boatright testified as follows (R. 1264):

> "My opinion is that under the present proration schedule the Humble leases will obtain a greater percentage of recoverable oil from the Hawkins Field than they would have obtained had the field been allowed to produce without any restrictions whatever."

Upon cross-examination, Dr. Boatright testified that in speaking of unrestricted conditions, he meant production without restrictions either as to the number of wells which could be drilled or as to the amount of oil which could be produced from any well (R. 1402). He further explained that his opinion was based upon the proposition that the townsite, being located in the very best portion of the field, and with very thick and permeable sands, and with wells having very high potentials, under unrestricted conditions would be able to recover "more oil if the restrictions were taken off than it would produce under the present Railroad Commission order" (R. 1265).

The proration order of the Railroad Commission therefore does not *cause* drainage, since drainage would take place under unrestricted conditions. It is true that by changing the proration order the Railroad Commission might *reduce* drainage, but this would amount to altering the relative rights of the parties as they existed under unrestricted conditions and thereby depriving townsite operators of the right to capture migratory oil.

This Court in the *Rowan & Nichols* cases took notice of the fact that the Texas law of property in oil and gas includes not only the rule of ownership in place, but also the rule of capture, which is recognized as a property right. (See 310 U. S., at p. 580.) This rule of property was

stated by the Supreme Court of Texas in *Brown* v. *Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935, 940, as follows:

> "Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership from oil and gas in place should be considered in connection with *the law of capture*. This rule gives the right to produce all of the oil and gas that will flow out of the well on one's land; and *this is a property right.*"

More recently, the Supreme Court of Texas has reaffirmed the same proposition as follows, in the case of *Corzelius* v. *Harrell*, 143 Tex. 509, 186 S. W. (2d) 961, 964:

> "The rule in this State recognizes ownership of oil and gas in place, and gives the lessee a determinable fee therein. It is also held that such rule should be considered in connection with *the law of capture, which is recognized as a property right*, and both rules are subject to regulation under the police power of this State."

Appellants in this case ignore the existence of the rule of capture as a property right under the decisions of the Supreme Court of Texas and thereby appellants rest their case upon a false premise. Their whole case is based upon the proposition that a denial to them of a recovery in proportion to the estimated oil in place beneath their leases is a denial of their property rights. The Texas courts, in this case, as in other cases, have held that this is not a correct statement of the appellants' property rights. Texas property law does not guarantee to Humble and its royalty owners the oil in place beneath its leases or insure it against drainage. If the owners of townsite properties under unrestricted and unregulated conditions, by virtue of favorable location upon the structure, would have been able to drain oil from other properties, then the Texas courts have held that this natural advantage is a property right and that

the Railroad Commission, in allocating the allowable production under restricted and regulated conditions, must take this property right into account. For example, in *Railroad Commission* v. *Magnolia Petroleum Co.*, 169 S. W. (2d) 253, it was held by the Texas Court of Civil Appeals that it would be confiscatory to deny to the oil company the right to share in the migration of oil which would naturally move to its lease by reason of physical forces in the reservoir, and that the Commission could not limit it to a recovery merely of the oil in place beneath its lease.

The effect of the argument made by Humble and its associates is that they contend that the Railroad Commission of Texas must, in enforcing restricted drilling and production, change the Texas law of property in oil and gas so as to restrict each operator to the oil in place beneath his lease. The Texas courts have held that this is neither necessary nor proper under the Texas statutes nor under the Texas law of property. On the question of the extent of the appellants' property rights in oil, the holding of the Texas court is final. In *Fox River Paper Co.* v. *Railroad Commission*, 274 U. S. 651, 655, 657, this Court said, speaking through Mr. Justice Stone:

> "There being no question of evasion of the constitutional issue, . . . this court on writ of error must accept as final the ruling of the state court of last resort on all matters of state law. . . .
>
> "We are not concerned with the correctness of the rule adopted by the state court, its conformity to authority, or its consistency with related legal doctrine. . . . It is for the state court in cases such as this to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be nonexistent.
>
> "We accept as conclusive the state court's view of the nature of the rights of riparian owners. We

therefore find in the refusal of the Commission to grant the permit no denial of the property rights of plaintiffs and hence no violation of the Fourteenth amendment."

See also *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540.

It is generally conceded that by the joint operation of the well-spacing and proration orders, a larger total recovery of oil will be achieved. Humble and its associates do not assert that they will recover a *smaller amount* of oil than they would have recovered in the absence of any restriction by the Railroad Commission. Nor, on the other hand, do they assert that *the percentage of the total recovery* which they now receive is less than the proportion which they would have received under unrestricted conditions. What they in effect ask for is, first, that the property right of small operators to capture migratory oil should be nullified, and, second, that substantially all of the benefits resulting from conservation regulations be handed over to the owners of large tracts. Since Humble and its associates are not receiving less oil than they would receive under unregulated conditions, nor a smaller proportion of the total recovery, their property rights under the Texas law are not being denied to them. This case therefore rests upon an adequate nonfederal ground, and, under established practice, the appeal should be dismissed. *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157; *Utley* v. *City of St. Petersburg*, 292 U. S. 106.

Conclusion

Although the appellants have "formally drawn in question" the validity of the Railroad Commission's proration order under the Fourteenth Amendment, it is submitted that this Court should dismiss or affirm the case because "it appears that the constitutional question presented is not, and was not at the time of granting the writ, substantial in

character" (See *Zucht* v. *King*, 260 U. S. 174, 176) because (1) the questions raised by the appellants have been so "explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy." (See *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311), and (2) "the decision of the state court sought here to be reviewed was based on a nonfederal ground adequate to support it." (See *Bell Telephone Co. of Pennsylvania* v. *Van Dyke*, 296 U. S. 533, 534.)

WHEREFORE, appellees, the Railroad Commission of Texas and its members and the Attorney General of Texas, and Chas. F. Ashcroft, et al., respectfully pray that the appeal be dismissed or that the judgment of the Court of Civil Appeals of Texas be affirmed upon this motion.

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No. 1344. HUMBLE OIL & REFINING CO. *v.* RAILROAD COMMISSION OF TEXAS ET AL.; and

No. 1345. WILLIAMS ET AL. *v.* RAILROAD COMMISSION OF TEXAS ET AL. Appeals from the Court of Civil Appeals, 3d Supreme Judicial District, of Texas. June 2, 1947. *Per Curiam:* The motion to affirm is granted and the judgments are affirmed. *J. A. Rauhut, Nelson Jones, Norman L. Meyers, Rex G. Baker* and *R. E. Seagler* for appellant in No. 1344. *Dan Moody* for Williams et al., appellants in No. 1345. *Price Daniel,* Attorney General of Texas, and *Fagan Dickson,* First Assistant Attorney General, for the Railroad Commission of Texas et al., and *James P. Hart* for Ashcroft et al., appellees. Reported below: 193 S. W. 2d 824.